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 Fletchermailto:bridget.murphy@slaughterandmay.com?subject=Query%20from%20Pensions%20Bulletin

New Law

Shared parental leave – extension to self-employed contractors?

The Shared Parental Leave and Pay (Extension) Bill was introduced to the House of Commons on 21st February 2018. The Bill makes provision about shared parental leave and pay for workers, including those that are self-employed.

Self-employed mothers currently have no entitlement to statutory maternity leave, but may be entitled to maternity allowance (which they will lose if they work for more than 10 'keeping in touch' days). The Bill would allow maternity allowance to be shared in blocks between parents who work on a self-employed basis, including allowing them to return to work for periods in excess of 10 days, before taking another block of maternity allowance. The aim is to more closely replicate the way in which shared parental leave works for employees.

The introduction of the Bill follows the recent launch of the government "Share the joy" campaign which aims to improve the uptake of shared parental leave by new parents.

The Bill is a Private Members' Bill and its second reading is scheduled to take place on 11th May 2018.

Cases Round-up

CJEU rules on pregnancy and collective redundancy

The CJEU has confirmed that EU law does not prevent employers dismissing a pregnant worker in the context of a collective redundancy, or require that such workers are given any priority status in relation to being retained or redeployed. The CJEU also did not endorse the controversial view expressed by the Advocate General that EU law protects pregnant workers even if they have not yet informed their employer of their condition (*Porras Guisado v Bankia SA*).

Background law: Article 10 of the Pregnant Workers Directive (PWD) prohibits the dismissal of workers from the beginning of their pregnancy to the end of their maternity leave (the 'protected period'), save in exceptional circumstances not connected with their condition which are permitted under national legislation and/or practice. It further provides that, if a worker is dismissed during the protected period, the employer must cite duly substantiated grounds for her dismissal in writing. A pregnant worker is defined as a "pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice" (Article 2(a)).

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

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

Collective redundancy: PG was employed by BSA. In January 2013, BSA opened a period of consultation with workers' representatives with a view to effecting a collective redundancy. In February 2013, the negotiating committee reached an agreement setting out the criteria to be applied in selecting those workers to be dismissed and those who were to be retained in

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employment with BSA. Special protection was afforded to married couples or de facto married couples and disabled employees, but not pregnant employees.

Dismissal and notification: In November 2013, BSA gave PG notice of termination of her employment pursuant to the negotiating committee agreement. PG was pregnant at the time, although BSA claimed they were not aware of her pregnancy at this stage. The dismissal letter stated that in the Barcelona province where she worked, an extensive adjustment to the workforce was necessary, and that in the assessment process carried out during the consultation period, her score had placed her among the lower scores of the province.

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

AG Opinion: AG Sharpston's Opinion was controversial in one particular aspect, which was her view that the PWD protects female workers during the protected period, even though they may not yet have informed their employer of their condition (despite the definition in Article 2(a)) (see our Bulletin dated 29th September 2017 for further details).

Decision: The CJEU held that:

- The PWD does not preclude national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy.
- Reasons not related to the individual workers concerned, which may be relied on in respect of collective redundancies within the meaning of the Collective Redundancies Directive, fall within the exceptional cases not related to the condition of pregnant workers within the meaning of the PWD.
- A dismissal decision taken during the protected period for reasons unconnected with the worker's pregnancy is not contrary to the PWD, if the employer gives substantiated grounds for the dismissal in writing and the dismissal of the person concerned is permitted under the relevant national legislation and/or practice.
- The grounds which must be given in writing are those justifying the collective redundancy (namely, economic or technical reasons or reasons relating to the undertaking's organisation or production), plus the objective criteria chosen to identify the workers to be made redundant.
- The PWD does not require that national legislation give priority status to pregnant workers and workers who have recently given birth or who are breastfeeding, in the context of a collective redundancy (in relation to either being retained or redeployed). Nevertheless, since the PWD contains only minimum requirements, Member States are free to grant higher protection to such workers.

UK law is compliant: The CJEU's decision suggests that UK law is broadly compliant with the PWD. The CJEU has taken a much more employer-friendly approach than the AG, both in terms of the restrictions on dismissing pregnant workers and the content of the dismissal notice.

Employer must know of pregnancy? The CJEU did not address the AG's Opinion that Article 10 protection applies even before the employer is aware that the employee is pregnant. This is not the position which is currently taken in UK law, where it generally must be shown that the employer was aware of the pregnancy in order for the employee to be protected. In the absence of an express endorsement of the AG's approach by the CJEU, it seems that the status quo may be maintained (i.e. that the employer must know of the pregnancy).

Redundancy: breach of collective consultation obligations on charity's collapse

The collapse of the charity Kids Company in August 2015 attracted significant press coverage. The EAT has now found that the charity breached its collective redundancy consultation obligations, which it found arose in June 2015 when the charity applied to the government for emergency funding and submitted a business plan that involved over half the staff being dismissed

(*Keeping Kids Company (in compulsory liquidation) v Smith*).

Business plan: In late 2014, KKC began experiencing acute financial difficulties. On 12th June 2015 it applied to the government for a grant of £3 million. Its application included a business plan for restructuring the company by late September 2015, which envisaged that over half of posts might be deleted (although no specific posts were identified at that stage).

Redundancies: Although the government initially offered a grant in accordance with the business plan, the decision was reversed at the end of July, when it became known that the Metropolitan Police were investigating safeguarding issues at KKC. On 5th August KKC closed and all employees were dismissed.

Claims: A number of employees brought claims for protective awards for failure to inform and consult over collective redundancies under section 188 TULR(C)A 1992. The Tribunal upheld the claims, finding that the obligation to consult was triggered on 12th June (even though KKC did not know at that stage who it was proposing to dismiss), and that there were no special circumstances to excuse the failure to consult.

Trigger point: The EAT dismissed KKC's appeal. It upheld the finding that, as at 12th June, there was a proposal that might affect all of KKC's employees, not simply those identified in the business plan. There was a clear, albeit provisional, intention to dismiss for redundancy and, given the potential impact upon all staff, this was not limited to particular categories of employee.

Identifying redundant employees: The EAT held that it was no answer for KKC to say that, as at 12th June, it did not have sufficient information to comply with its obligations or engage in 'meaningful' consultation, at least until it had received the government's response to its grant application. The EAT noted that there was no obligation to provide the actual names of employees who would be dismissed, and the on-going consultation envisaged under section 188 allows for the possibility that information will become available during the process.

Consultation must begin 'promptly': The EAT also upheld the Tribunals finding that the obligation to consult 'in good time' meant that consultations had to begin 'promptly' – even before KKC knew exactly who would be made redundant. This does not mean that consultation must begin immediately after the obligation is triggered; there should be a realistic assessment of the timescale required to ensure 'meaningful' consultations could be held.

No special circumstances: The EAT rejected KKC's argument that either the outstanding funding application to the government or the subsequent withdrawal of the grant were 'special circumstances'. The Tribunal had already found that the application was not a reason to delay consultation, and so it could not constitute special circumstances. It had also found that the grant withdrawal was irrelevant, since the obligation to consult had already crystallised on 12th June. Although further consultation may have been prevented beyond 30th July, there was no special circumstance prior to 30th July.

Guidance for employers: The EAT's judgment confirms that collective redundancy consultation obligations may be triggered before the employer is able to identify which roles may be made redundant. Employers should therefore be prepared to begin consultations at this early stage, in order to avoid protective awards.

Stand-by time at home is "working time"

The concept of what is 'working time' under the Working Time Directive (WTD) has generated significant case law, particularly as regards stand-by time. The CJEU has recently held that stand-by time at home, where the worker is obliged to respond to calls from the employer within a short period, must be regarded as "working time", given the significant restrictions this imposes on the worker's opportunities for other activities (*Ville de Nivelles v Rudy Matzak*).

Firefighter on call at home: M was a retained firefighter for the Ville de Nivelles in Belgium. He was required to be available on call for work, for one week out of every four, during the evenings and at the weekend. During his stand-by duty (which was unpaid) M was required to remain contactable and, if necessary, report to the fire station as soon as possible.

Claim: M claimed that he should be paid for time spent on stand-by duty. The Higher Labour Court of Brussels made a reference to the CJEU to

determine whether his on-call time should be regarded as working time under the WTD.

Working time: The CJEU held that stand-by time which a worker is required to spend at home, with the duty to respond to calls from his employer within a short period of time – which very significantly restricts the opportunities to carry out other activities – must be regarded as 'working time'. The determining factor for the classification of 'working time', within the meaning of the WTD is the requirement that the worker be physically present at the place determined by the employer and be available to the employer in order to be able to provide the appropriate services immediately in case of need.

On the facts: In the present case, M was obliged to respond to calls from his employer within eight minutes, and required to be physically present at the place determined by the employer. The CJEU considered that, even if that place is the worker's home and not his place of work, that was sufficient, given the constraints resulting from the need to reach his place of work within eight minutes. It found that M's situation differed from that of a worker who, during his stand-by duty, must simply be at his employer's disposal (insomuch as it must be possible to contact him).

Extension to UK law: This judgment suggests that on-call time spent in a worker's home could qualify as working time, if their freedom to engage in rest activities during that time is substantially impacted. This represents an extension to UK case law, which has tended to focus on whether the employee is required to remain on the employer's premises during stand-by time (or, for example, where workers live in accommodation tied to their job).

Pay is separate: The CJEU did allow that Member States may provide that the remuneration of a worker during 'working time' differs from that of a worker in a 'rest period', even to the point of not granting any remuneration during that period. This has also been reflected in UK case law, where the question of whether something is "working time" is separate from the question of whether the worker is entitled to be paid for that time.

HMRC wins IR35 claim against BBC journalist using PSC

HMRC have been scrutinising the tax arrangements of individuals using a personal services company (PSC) for some time. If the arrangements are such that the individual would have been an employee, had the services been provided directly under a contract between the individual and the client, the IR35 intermediaries legislation will apply. This means that income tax and NICs should have been accounted for by the PSC. The First-Tier Tax Tribunal (FTT) recently made such a finding in a case involving a journalist providing services to the BBC (*Christa Ackroyd Media Limited v HMRC*).

Journalist engaged via PSC: Christa Ackroyd (A), a television journalist, was engaged by the BBC via her PSC (CAM). Under the relevant contract, CAM agreed to provide the services of A as a broadcaster for up to 225 days a year to the BBC for a period of seven years. In return, the BBC agreed to pay to CAM an annual fee (payable in monthly instalments) and a performance related fee that was payable if the commercial ratings of the BBC exceeded its competition (the ratings of the program 'Look North' as against the ratings of ITV's 'Calendar').

Tax claim: HMRC issued determinations to CAM for income tax and NICs on the basis that A was an employee under a hypothetical contract between the BBC and A. CAM and A contended that A was a self-employed contractor and that CAM had no liability to account for income tax or NICs under the IR35 regime.

Decision: The FTT held that A was an employee under the hypothetical contract between A and the BBC. The two most significant factors that suggested employment in this case were the length of term of the contract, and the contractual control that the BBC had over A's work.

Length of contract: The FTT noted that the contract was a fixed term contract for seven years, and A had to be available to the BBC for at least 225 days each year (this made it effectively a full-time job). Although A was able to undertake work for others, she could only do so with the BBC's consent. The FTT found that it was a 'highly stable, regular and continuous arrangement.'

Control: The FTT also held that the BBC had ultimate control of A's work. Although A had no line manager, was not subject to an appraisal procedure and the BBC implemented many of A's

suggested changes to the format of 'Look North', the FTT found that the BBC was not contractually obliged to do so. Although the CAM contract had no express term dealing with control, the FTT held that it was an implied term of the hypothetical contract in order to give that contract business efficacy.

Other factors: The FTT also considered it to be relevant that:

- the CAM contract provided that A could not provide a substitute to carry out the work, and
- A was not in business of her own account (although she used some of her own equipment, she did not manage or invest in her business and she did not take on any financial risk).

Wider relevance: The FTT's judgment makes reference to a number of other outstanding appeals on IR35 involving television presenters and PSCs. The outcome of these cases will be of general interest outside the television sector, given the small number of decisions on PSCs and IR35.

Points in practice

Tax on termination payments: HMRC Employer Bulletin

In the February 2018 edition of its Employer Bulletin, HMRC has included the following section on the new rules for termination payments made on or after 6th April 2018. The sections highlighted below in red are worth noting in particular:

Payments in lieu of notice

With effect from 6 April 2018, some payments and benefits made in connection with the termination of an employment will be chargeable to income tax and Class 1 National Insurance Contributions (NICs) as general earnings and will not benefit from the £30,000 threshold.

This change applies to payments or benefits received on or after 6 April 2018 in circumstances where the employment is also ended on or after 6 April 2018.

The legislation being introduced splits payments and benefits, which fall within Section 401(1) ITEPA 2003, into two elements:

- The first element, post-employment notice pay (PENP) is taxable as general earnings and will be subject to Class 1 NICs from 6 April 2018, subject to parliamentary approval. The PENP represents the amount of basic pay the employee will not receive because their employment was terminated without full, or proper notice being given. PENP is calculated by applying a formula set out in the legislation to the total amount of the payment, or benefits paid in connection with the termination of an employment.
- The second element is the remaining balance of the termination payment, or benefit, which is not PENP. This is taxable as specific employment income to the extent that it exceeds £30,000 and is treated in the same way as other payments and benefits taxable under section 403 ITEPA 2003.

PENP calculations should not be applied to statutory redundancy payments. These payments are always taxable as specific employment income and subject to the £30,000 exemption where appropriate.

As an employer you will be required to apply the PENP formula to the total amount of relevant termination payments, or benefits. You should operate PAYE to deduct income tax and Class 1 NICs from the amount of PENP from 6 April 2018. You should then apply the £30,000 exemption, where applicable, to the second element of the relevant termination payment and deduct income tax (but not NICs) accordingly.

Detailed guidance on how and to what payments you should apply the PENP formula to will be published in the Employment Income Manual in due course.

GDPR: FCA and ICO joint update

The Financial Conduct Authority (FCA) and the Information Commissioners Office (ICO) have published a joint update on the General Data Protection Regulation (GDPR).The update explains that:

- Compliance with the GDPR is now a board level responsibility, and firms must be able to produce evidence to demonstrate the steps that they have taken to comply.
- The FCA and ICO believe the GDPR does not impose requirements that are incompatible with the rules in the FCA Handbook, and that a number of requirements are common to both (for example, the requirement to treat customers fairly, and to respect the privacy of individuals such as firms' customers and employees).
- While the ICO will regulate the GDPR, the FCA will also consider compliance with the GDPR requirements under its rules. As part of their obligations under SYSC, firms should establish, maintain and improve appropriate technology and cyber resilience systems and controls.
- Over the coming months, the FCA and ICO intend to review their 2014 memorandum of understanding to ensure it is still suitable to address future collaboration.
- The FCA and ICO recognise that there are ongoing discussions to ensure specific details of the GDPR can be implemented consistently within the wider regulatory landscape. The FCA and ICO will continue to collaborate in the coming months to address firms' concerns and support their preparations for the introduction of the GDPR in May 2018.

WEC inquiry into sexual harassment in the workplace

The House of Commons Women and Equalities Committee has launched a full inquiry into sexual harassment in the workplace. The inquiry will look at what action can be taken by the government and employers to change workplace culture, increase confidence to report problems, and make tackling harassment a higher priority. Other issues to be considered are:

- how widespread sexual harassment in the workplace is, and whether this has increased or decreased over time;
- who experiences sexual harassment in the workplace, who perpetrates it and what the impact is on different groups;
- how staff can be better protected from sexual harassment by clients, customers and others;
- how effective—and accessible—tribunals and other legal means of redress are, and what improvements could be made to those systems;
- the pros and cons of using non-disclosure agreements (NDAs) in sexual harassment cases, and what can be done to prevent inappropriate use of NDAs.

The Committee is inviting written submissions by 13th March 2018.

Employers "in the dark ages" over recruitment of pregnant women and new mothers

The Equality and Human Rights Commission (EHRC) has published new statistics which show that UK employers are 'living in the dark ages' and have concerning attitudes towards unlawful behaviour when it comes to recruiting women. The survey of 1,106 senior decision makers in business found that:

- 36% of private sector employers agree that it is reasonable to ask women about their plans to have children in the future during recruitment;
- 59% agree that a woman should have to disclose whether she is pregnant during the recruitment process;
- 46% of employers agree it is reasonable to ask women if they have young children;
- 44% of employers agree that women should work for an organisation for at least a year before deciding to have children;

- 40% of employers claim to have seen at least one pregnant woman in their workplace 'take advantage' of their pregnancy;
- around a third believe that women who become pregnant and new mothers in work are 'generally less interested in career progression' when compared to other employees in their company; and
- 41% agreed that pregnancy in the workplace puts 'an unnecessary cost burden' on the workplace.

The EHRC is calling on employers to eliminate these attitudes and other forms of pregnancy and maternity discrimination in the workplace. It is urging employers to sign up to the 'Working Forward' initiative to help end pregnancy and maternity discrimination, whilst asking the public to share their pregnancy and maternity-related experiences with the hashtag **#maternitywrongs**.

The Working Forward campaign asks businesses to commit to taking action on at least two of the three action areas in addition to leadership: employee confidence, supporting line managers and flexible working. It also provides employers with advice, guidance and resources to deliver on their pledges.

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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