SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

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For more information, or if you have a query in relation to any of the above items, please contact the person with whom your normally deal at Slaughter and May or Clare Fletcher

New Publication

Employment rates and limits: April 2018

We attach an updated version of our Employment rates and limits document. This document summarises the various statutory rates of payment and limits on compensation for the main types of employment claim, as will apply from 6th April 2018. We have also included a summary of the time limits and qualifying service requirements for such claims, as well as a reminder of the various collective consultation timeframes.

Cases Round-up

Supreme Court: Failure to disclose relationship was misconduct justifying dismissal

The Supreme Court has decided that a head teacher's failure to disclose her relationship with a convicted sex offender to the school governors amounted to gross misconduct which justified her dismissal (albeit that the dismissal was unfair on procedural grounds (*Reilly v Sandwell Metropolitan Borough* Council).

Head teacher's relationship: R was the head teacher of a primary school, employed by the SMBC. R had a relationship with another individual (IS), who was described as a close friend (they were not in a sexual or romantic relationship). They bought a property as an investment in their joint names and set up a joint bank account to pay the mortgage instalments. IS lived in the property and R sometimes stayed there overnight.

Conviction: Shortly after R applied for the head teacher position with SMBC, R witnessed IS's arrest at their jointly-owned property on suspicion of having downloaded indecent images of children. He was convicted of that offence and was made subject to a sexual offences prevention order, which forbade him from having unsupervised access to children under 18. He was also added to the sex offenders' register.

Non-disclosure: Meanwhile, R had commenced employment with SMBC. She sought advice from various people, including a police officer, a probation officer, the Criminal Records Bureau (now the Disclosure and Barring Service) and governors at other schools, about whether she ought to disclose her relationship with IS and his offence to the school. She understood that it was not necessary and so did not do so.

Dismissal: When SMBC learned of R's relationship with IS, and the fact that he was a convicted and registered sex offender, R was suspended and eventually dismissed for gross misconduct. SMBC claimed that R's actions amounted to a breach of the implied term of trust and confidence by failing to disclose information which could put the school at risk of not upholding its duties to safeguard the children at the school. The panel were particularly concerned by R's continuing refusal to accept that her relationship with IS might pose a risk to pupils and the school, or that she should therefore have disclosed it to the governors.

Claim: R subsequently brought proceedings for unfair dismissal. The Tribunal concluded that R's dismissal was for a reason related to her conduct, and that dismissal was also within the band of reasonable responses. There were however procedural irregularities in the appeals process which rendered the dismissal unfair. R's compensation was however significantly reduced, on the basis that there was a 90% chance that had a fair appeal procedure been adopted, R would have been dismissed in any event, and that she had 100% contributed to her dismissal. R appealed unsuccessfully to both the EAT and the Court of Appeal.

Contractual duty to disclose: The Supreme Court unanimously dismissed R's further appeal. It noted that in this case, R was under a contractual obligation to assist the governing body in discharging its duty to safeguard the pupils. The question was whether her relationship with IS engaged the governing body's safeguarding functions. The Court noted that:

- Parliament has previously recognised (for example via the Childcare Act 2006) that sexual offenders towards children can represent a danger to children not only directly but also indirectly by operating through those with whom the children associate.

- IS was the subject of a serious, recent conviction and the basis of his sentence was that he represented a danger to children.
- As head teacher, R was likely to know important information about her pupils, including their whereabouts, their routine and their circumstances at home. She was also likely to be able to authorise visitors to enter the school premises.
- IS's relationship with R therefore created a potential risk to the children at the school. This risk required the assessment of the governors.

Dismissal was reasonable: In these circumstances, the Court was satisfied that it was a reasonable response for the disciplinary panel to have concluded that R's non-disclosure of her relationship with IS merited her dismissal. R's continuing refusal to accept that she had been in breach of her duty suggested a lack of insight which, it was reasonable to conclude, rendered it inappropriate for her to continue to run the school.

Relevance to other cases? Although a Supreme Court decision, this case does not represent clear authority that a failure to disclose a relationship which may impact on an employee's role and responsibilities will always be gross misconduct. R's refusal to accept that her relationship with IS might pose a risk to pupils and should have been disclosed was a significant factor in this case. The school stated that, if R had accepted her error, it might have considered an alternative sanction to dismissal, particularly in light of her unblemished disciplinary record.

Contractual duty was relevant: The existence of a contractual obligation to disclose the relationship was also relevant here. Although the obligation to disclose this particular information was not expressly set out in R's contract of employment, the EAT upheld the Tribunal's finding that it 'obvious' that failing to disclose it was misconduct (and it seems the existence of a contractual obligation was not further disputed).

Disability discrimination: expectation or assumption of working late

An employer may come under a duty to make reasonable adjustments under the Equality Act 2010 (EA 2010) where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage. The Court of Appeal has recently confirmed that an expectation or assumption that someone will work late may amount to a PCP for these purposes (*United First Partners Research v Carreras*).

Disability leads to reduced hours: C was an analyst at a brokerage and research firm and often worked 12 hours a day. In July 2012 he was severely injured in a motorbike accident and as a result suffered from dizziness, fatigue, headaches, difficulty concentrating, and he found it difficult to work in the evenings. For the first six months following his return to work, C worked about 8 hours a day but this increased to 10-11 hours a day.

Longer hours: At first C made a few requests to work late (until about 9pm) but before long UFPR had started to ask C to work into the evening and it was soon assumed C would work late; rather than ask whether C was prepared to work late, UFPR would ask C what nights he would work late. C said that he was put under pressure to work late and he was concerned that if he did not then he might be made redundant or lose his bonus.

Claim: In February 2014 C wrote to UFPR to object to working late because of tiredness. An argument followed with one of the owners of the business who told C that he could leave if he did not like it. C resigned and claimed constructive unfair dismissal and failure to make reasonable adjustments. The Tribunal dismissed C's claim because the PCP that C had pleaded was a requirement to work late (which it found did not exist) and not an expectation or assumption (which it found did exist). The EAT reversed this decision, and UFRP appealed.

Liberal approach to PCP: The Court of Appeal dismissed UFPR's appeal. In relation to the PCP issue, it held that the Tribunal's approach was too narrow. The term 'requirement' does not necessarily carry a connotation of 'coercion'; on the contrary, it may, depending on the context, represent no more than a strong form of 'request'.

Expectation was sufficient: The Court noted that C did not allege that he was explicitly ordered to work in the evenings, or subjected to other explicit pressures which had the effect of depriving him of any real choice. Rather, it was

that it was made clear by a pattern of repeated requests that he was expected to do so, and that that created a pressure on him to agree. In reality there was an assumption or expectation that C would work late. The Court found that such a state of affairs could in principle constitute a PCP – more particularly, a 'practice' – within the meaning of section 20(3) of the EA 2010.

Beware long hours cultures: This case may raise concerns for employers because in many businesses which operate a 'long hours culture' employers are likely to assume that employees are happy to work late. It may seem reasonable for UFPR to have assumed C was happy to work late given that he worked late before the accident, he had requested to work late after the accident and he had never complained until February 2014.

Practice points: If an employee has a potential disability then it is good practice to regularly meet with the employee to ensure that there are no reasonable adjustments that need to be put into place and to consider whether the employee is working long hours. If an employee raises a concern about long working hours then an employer should consider whether an employee may have a disability and if so, reasonable adjustments may need to be put in place following input from the employee and potentially occupational health.

Pre-cancerous condition was a deemed disability

Paragraph 6 of Schedule 1 to the Equality Act 2010 (EA 2010) deems cancer to be a disability. The EAT has recently held that an employee with a pre-cancerous condition fell within this definition (*Lofty v Hamis t/a First Café*).

Pre-cancerous condition: L, a café assistant, developed a blemish on her cheek. Following a biopsy, her consultant dermatologist told her that she had lentigo maligna, a pre-cancerous lesion which could result in skin cancer. L was signed off work from August 2015 and underwent two operations to remove the malignant cells. These were successful and by mid-September L was clear of any possible cancer.

Dismissal: However, L continued to be signed off work for related health issues, including subsequent skin grafts and extreme anxiety. In December 2015, H terminated L's employment because she had failed to attend meetings to discuss her continued absence.

Claim: L brought employment tribunal claims for unfair dismissal and disability discrimination. The Tribunal upheld the former claim but dismissed the latter on the basis that L did not have a disability. The Tribunal's view was that L's condition did not amount to cancer for the purposes of para 6 of Schedule 1: the consultant had referred to it as a 'pre-cancerous' condition and following L's operations it was confirmed that she had not developed skin cancer.

Medical evidence… The EAT allowed L's appeal. The evidence before the Tribunal – from L's GP, the British Association of Dermatologists and Cancer Research UK (CRUK) – was that L had an 'in situ' or 'stage 0' melanoma, i.e. cancer cells in the top layer of her skin. The EAT also noted that CRUK's website stated that in situ cancers are not cancers 'in the true sense' because they cannot spread to other parts of the body.

…versus legal definition: However, it found that para 6 of Schedule 1 does not distinguish between invasive and other forms of cancer; it requires only that the claimant has cancer. The evidence explained that "pre-cancer" may be regarded as medical shorthand for a particular stage in the development of cancer; it does not mean there is no cancer for the purposes of the EA 2010. The EAT noted that in enacting this provision of the EA 2010, Parliament intended to avoid unnecessary complexity and uncertainty, having concluded that it was not possible to distinguish effectively between those whose cancers are likely to go on to require substantial treatment, and those that are not. The EAT therefore substituted a finding that L had a deemed disability under the EA 2010.

Medical evidence is vital: This case reinforces the need for cogent medical evidence when determining if an employee is disabled for the purposes of the EA 2010. The EAT conceded in this case that a diagnosis of 'pre-cancerous' cells might mean something different depending upon where the cells are to be found (even if, in terms of skin cancer, the evidence in this case showed that it was a type of cancer). Each case will always therefore turn on its specific facts.

No obligation on employer to revisit dismissal decision on learning of employee’s pregnancy

In claims for automatic unfair dismissal by reason of pregnancy and pregnancy discrimination, the legal test to be applied are (respectively) whether the pregnancy itself had been the reason or principal reason for dismissal, or whether the decision to dismiss had been because of pregnancy. Both tests require an employer to know of the pregnancy when it took a decision to dismiss. The EAT has recently confirmed that there is no positive obligation on an employer to revisit a decision to dismiss made prior to knowledge of an employee's pregnancy (*Really Easy Car Credit Ltd v Thompson*).

Performance issues: T was employed by RECC (a small family-owned company selling second-hand cars) as a telesales operator. During her three month probationary period, certain issues had been raised with T, specifically about taking too many cigarette breaks, about wearing the uniform and in relation to her interactions with another colleague. She also had a period of absence from work at short notice, which (unknown to RECC at this stage) was pregnancy-related.

Dismissal and pregnancy: On 3rd August 2016, after an emotional outburst, RECC decided to dismiss T because of her “*emotional volatility*” and because she did not fit in with their work ethic. The next day, T told them she was pregnant. RECC contacted its lawyers, and said it was told that T’s pregnancy was irrelevant as the reasons for her dismissal were unconnected with pregnancy. On 5th August, RECC handed T a dismissal letter, dated 3rd August. T claimed that the letter had been falsely backdated and that the decision to dismiss had not been taken until after she told them of her pregnancy.

Claims: T lodged claims of pregnancy discrimination and automatic unfair dismissal by reason of pregnancy. The Tribunal held that the decision to dismiss had been taken on 3rd August, and that it was unrelated to her pregnancy. However, it also found that after RECC learnt of the pregnancy, it must have been obvious that her emotional volatility and other conduct (and absence) was pregnancy related. It held that this was sufficient to reverse the burden of proof for the purposes of T’s discrimination claim, and that RECC had failed to establish that the dismissal was in no sense whatsoever related to T’s pregnancy. The Tribunal therefore upheld T’s claims.

No knowledge at time of decision: The EAT allowed REC’s appeal. It noted that, on the Tribunal's findings of fact, there had been no further decision made by RECC after 3rd August, and that that decision was untainted by any knowledge or belief in T’s pregnancy. There was nothing that could be inferred as to a positive decision or additional set of beliefs by any relevant decision taker within REC after that point. The Tribunal appeared instead to have found RECC liable by omission, and to have considered that it should have taken positive steps to revisit its decision after it learnt of T’s pregnancy.

No duty to revisit decision: The EAT found that the legal test to be applied was to ask whether the employee's pregnancy itself had been the reason or principal reason for her dismissal (for automatic unfair dismissal purposes) or whether the decision to dismiss had been because of her pregnancy (for discrimination purposes). The EAT found that this required the employer to know of the pregnancy when it took the relevant decision; it imposed no positive obligation on the employer to then revisit its decision after it learnt of her pregnancy. The EAT therefore remitted the case to a fresh tribunal for reconsideration.

Paper trail is key: In this case, the employer was able to clearly demonstrate (via the date of the dismissal letter and discussions between management) that the dismissal decision had been taken before it knew of the employee’s pregnancy. Such evidence will be important in refuting claims that the dismissal was in fact pregnancy-related.

Points in practice

Use of NDAs: SRA warning notice

In recent months the use of non-disclosure agreements (“NDAs”) has attracted significant media attention, notably in the context of the Harvey Weinstein and Presidents Club stories. Concern has been expressed that NDAs have been used to exert inappropriate pressure on individuals, and to prevent legitimate complaints being made to the police and/or individuals co-operating with police investigations.

The Solicitors Regulatory Authority (SRA) has now published a warning notice on this topic. This has

implications for in-house lawyers and their external law firms. The notice makes it clear that lawyers should not, on behalf of clients, "*use NDAs as a means of improperly threatening litigation or other adverse consequences, or otherwise exerting inappropriate influence over people not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies*". It also suggests that it may be appropriate for NDAs to be clear about what disclosures are not prohibited by the NDA.

Action point: In light of this, we advise that a clause is included in all settlement agreements to make it clear that its confidentiality provisions do not apply to a protected disclosure within the meaning of Part IVA of the Employment Rights Act 1996 (whistle-blowing), reporting an offence to a law enforcement agency, co-operating with a criminal investigation or prosecution, or any disclosures which are required by law or regulatory requirements.

Training opportunities: We are also developing training on the increasingly sensitive issues that arise when negotiating settlement agreements, and dealing with allegations which may be reportable to external bodies or regulators. We will make more details available in due course, but in the meantime if you would be interested in this sort of training session, please contact clare.fletcher@slaughterandmay.com or your usual Slaughter and May contact.

Women on boards: new BEIS figures

The Department for Business, Energy and Industrial Strategy (BEIS) has released new data on female representation on FTSE 350 boards, to mark International Women's Day. The findings highlight that FTSE 350 businesses are on track to reach the 2020 target of having a third of board positions filled by women.

The BEIS figures show that:

- approximately 29% (309) of FTSE 100 board positions are held by women - up from 12.5% in 2011;
- FTSE 250 companies have seen the number of female board positions rise to 23.4%; and
- FTSE 350 companies have also seen the number of female chairs rise to 20, and the number of women on boards has increased to 25.2%.

Separately, the Quoted Companies Alliance (QCA) has published research showing that publicly quoted companies are actively looking to appoint women to top roles to achieve a better boardroom balance and address concerns about diversity in business. The research shows 40% of quoted companies recruiting for board positions in 2017 explicitly sought out female candidates for their long list, compared to 36% in 2015. 67% also included female candidates on their shortlist—up from 59% in 2015.

FCA to consult on new public register of certification employees and others at authorised firms

The Financial Conduct Authority (FCA) has published a statement announcing that it will consult on proposals to make information on a wider range of individuals at authorised firms publicly available.

The FCA and PRA currently maintain a public financial services register, the "FS Register", of the firms they regulate and the individuals they have approved. Under the FCA's proposals to extend the senior managers and certification regime (SM&CR) to almost all regulated firms, the FCA will only approve the most senior individuals within firms. This means that only senior managers will appear on the FS Register and not those employees who firms certify as fit and proper under the certification regime.

The FCA has now acknowledged the public value of it maintaining a central public record of certification employees and other important individuals in regulated firms, including NEDs, financial advisers, traders and portfolio managers. The FCA will consult "by summer 2018" on policy proposals to address this. The FCA has also stated that it plans to issue an update "shortly" on its work to improve the usability of the FS Register, which incorporates feedback from the Work and Pensions Select Committee.

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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