SLAUGHTER AND MAY

Pensions and Employment: Employment/Employee Benefits Bulletin

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Legal and regulatory developments in Employment/Employee Benefits

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Cases Round-up

Shared parental leave: failure to enhance pay was not direct sex discrimination

Since shared parental leave (ShPL) was introduced in 2015, employers have had to consider whether to offer any form of enhanced pay for ShPL, and whether they need to do so on a comparable basis to the enhanced pay they offer for maternity leave. The EAT has now confirmed that failing to offer comparable enhanced pay in these situations is not direct sex discrimination, since the two types of leave are different, and women on maternity leave enjoy special protections (*Capita Customer Management v Ali*).

Father seeks ShPL: A took two weeks paternity leave on full pay following the birth of his daughter. He then sought to take a further 12 weeks ShPL, to enable his wife to return to work (as she had been medically advised to do, following a diagnosis of postnatal depression).

Different pay policies: CCM's policy permitted A to take ShPL, but only on statutory pay (this was the same for fathers and mothers taking ShPL). In contrast, it offered full pay for 14 weeks' maternity leave (a period chosen to reflect the minimum period of maternity leave required under the Pregnant Workers' Directive (PWD)) followed by 25 weeks' statutory maternity pay.

Claim: A was deterred from taking ShPL by CCM's pay policy, and claimed to have suffered direct sex discrimination. He sought to compare himself with a woman taking maternity leave, on the basis that after the first two weeks compulsory maternity leave, the father and mother are equally able to look after the child. CCM took the view that it did not have a legal obligation to pay a father taking ShPL more than the statutory rate of pay while on leave. The Tribunal upheld A's direct discrimination claim, finding that A should have been entitled to the 12 weeks' ShPL at full pay (see our Bulletin dated 16th June 2017).

No valid comparison: The EAT allowed CCM's appeal, overturning the finding of direct discrimination. It found that the two types of leave are not comparable – maternity leave is mainly provided for the health and safety of a mother, whereas ShPL is purely for childcare reasons. Therefore, a father taking ShPL was not in a comparable situation to that of a mother taking maternity leave. The correct comparator in this case was therefore a woman on ShPL. Since parents of either sex were given ShPL on the same terms, the inevitable conclusion was that A was not discriminated against on grounds of sex.

Special protection for maternity leave: In any event, the EAT also found that more favourable treatment given to women on maternity leave was rendered lawful by the exception in section 13(6)(b) of the Equality Act 2010. In this regard, it was highly relevant that the 14 week period of enhanced maternity pay offered by CCM exactly aligned with the minimum period of maternity leave prescribed by the PWD.

No need to change policies: The effect of this judgment is that employers who choose to pay more by way of enhanced maternity pay than by way of shared parental pay may continue to do so without the risk of a direct discrimination challenge. There is therefore no need (for now) for employers to change their family leave policies or the amount of enhanced pay offered for each type of leave. Had the decision gone the other way, there was concern that employers may change their policies, to the detriment of women on maternity leave, by equalising the pay for both types of leave to statutory pay.

Is duration of enhanced pay relevant? The EAT's judgment clearly endorses the approach of paying enhanced maternity pay for the first 14 weeks, by analogy with the PWD. But what about enhanced maternity pay policies which operate for longer periods? The EAT's judgment makes some suggestion that fathers and mothers may be in a more comparable position after 26 weeks (i.e. the end of ordinary maternity leave), meaning that any enhanced maternity pay which extends beyond the first 26 weeks may be at risk of challenge. However, not only is this rare in practice, it is also likely that EU case law contradicts the EAT's comments and would protect enhanced maternity pay policies for the entire maternity leave period.

Indirect discrimination risk? The EAT's judgment deals with the direct discrimination risk.

However, the appeal in *Hextall v Leicestershire Police* was heard alongside it, and considers the alternative question of whether it is indirect sex discrimination to pay men on ShPL at a lower rate than mothers on maternity leave. Judgment in *Hextall* was not handed down simultaneously, and we will report further when it becomes available.

No damages for negative reference following disciplinary proceedings

The High Court has dismissed a claim for damages from an independent financial advisor based on a reference provided by his former employer to a prospective new employer. The Court found that the former employer had a legitimate and proper basis for the negative opinion expressed in the reference, and was not required to inquire into the procedural fairness of earlier investigations upon which facts and opinions in the reference were based (*Hincks v Sense Network Ltd*).

Misconduct: H was employed by SN as an independent financial advisor. A number of historic issues had led to H being subject to tight pre-approval checks on his transactions. Then in December 2013, H was involved in the sale of an investment to a long-standing client (the Carter transaction), in breach of a number of SN's processes.

Investigation and dismissal: When this came to the attention of SN's compliance team, H was suspended and invited to an investigation meeting, at which he maintained that he had acted honestly and (to the best of his knowledge) in accordance with SN's procedures. However, SN concluded that H had knowingly breached its procedures, and had done so for gain (i.e. the fee income from the Carter transaction, and his desire to maintain the profitable relationship with this client). H was therefore dismissed.

Reference: H subsequently provided a reference for H in response to a request from a prospective new employer. The reference detailed the history of H's performance issues, and stated that: "*In November 2014, we became aware that [H] had transacted a product outside of our normal pre-approval process … Our subsequent investigation concluded that, in spite of the explanations offered by [H], it was reasonable to conclude that he had knowingly and deliberately circumvented the agreed process. He was terminated on 13th January 2015*".

Claim: H claimed damages in negligent misstatement and breach of contract for the loss of earnings which he said resulted from the unfavourable reference. H claimed that elements of the reference were not true and accurate, that overall it gave a misleading impression, and that the opinions expressed in the reference were based on an internal investigation which he characterised as having been no more than "an ambush" and "an inadequate sham". SN maintained that its approach to the reference was in part dictated by the regulatory obligations set out in the FCA's Supervision Manual, to provide "complete and accurate information" concerning the person's fitness and propriety.

Duty of care on referee: The High Court dismissed H's claims. It found that the standard of care to be exercised by a reasonable reference writer has the following features:

a) to conduct an objective and rigorous appraisal of facts and opinion, particularly negative opinion;

b) to take reasonable care to be satisfied that the facts set out in the reference are accurate and true and that, where an opinion is expressed, there is a proper and legitimate basis for the opinion;

c) where an opinion is derived from an earlier investigation, to take reasonable care in considering and reviewing the underlying material so that the reference writer is able to understand the basis for the opinion and be satisfied that there is a proper and legitimate basis for the opinion; and

d) to take reasonable care to ensure that the reference is fair, in the sense of not being misleading either by reason of what is not included or by implication, nuance or innuendo.

No duty to revisit fairness of investigation: The High Court rejected H's contention that the reasonable reference writer should inquire into the procedural fairness of earlier investigations. It found that, unless there is a "red flag" prompting further inquiry (such as obvious errors in the underlying material, or new information which casts a doubt on the reliability or integrity of the facts or opinions in the material), there is no duty to examine the procedural fairness of the underlying investigation.

On the facts…Turning to the facts of the present case, the Court found that the conclusions in the reference, including the negative opinion, were more than amply supported. The underlying material provided a proper and legitimate basis for the conclusion that H knowingly breached the pre-approval requirements, and for the negative opinion expressed in the reference. It followed that the reference did not amount to either negligent misstatement or breach of contract.

Good news for former employers: This judgment provides some comfort to employers providing references, particularly in the regulatory context. In particular, the Court's rejection of any duty on a reference writer to inquire into the procedural fairness of earlier investigations will be welcomed, given that a reference request may come months or even years after the investigation has concluded, and such a duty would impose a significant burden on the former employer.

What if no investigation? Given that the investigation had concluded in this case, the judgment does not give any assistance on the more vexed question of whether regulated employers should disclose details of allegations against an individual where there was no investigation, or the investigation was not completed before the individual left employment. We have not yet seen any consistent market practice develop in this area, which should therefore be approached on a case by case basis.

Unlawful exercise of malus provision in LTIP

The High Court has found that Lloyds Bank plc (LB) wrongfully withheld shares due to the former CEO and another former director under an LTIP by unlawfully applying a malus clause. The Court decided that LB did not have the power to amend the terms of existing awards under the LTIP, or to reduce awards where shares had already vested. The effect was that LB was liable to pay nearly £3 million to the two former executives (*Daniels v Lloyds Bank Plc*).

Retiring directors: D was employed by LB as its CEO, and T was employed as a Group Executive Director. D and T retired from employment in 2011 and 2013 respectively, and were treated as 'good leavers' for the purposes of LB's LTIP, meaning that they retained their awards subject to the normal performance period and targets.

Amendments to LTIP: LB made amendments to its LTIP in 2012, in particular to introduce malus provisions. Rule 6.4 (as amended) effectively gave LB's Remuneration Committee the ability to adjust any award, which would otherwise vest as the performance conditions had been met, downwards (including to nil) if in the Committee's discretion it determined that the performance of the company, any member of the group, any business area or team and the conduct, capability or performance of the participant justified an adjustment. Under rule 17, the Committee had the power to amend the LTIP without requiring shareholder approval (or the consent of participants) if the amendment was a minor change to benefit the administration of the LTIP, to comply with or take account of any proposed or existing or changed legislation or for tax purposes.

Withholding of shares: Following D and T's retirement, the board of LB resolved that the performance conditions of the relevant LTIP awards had been satisfied in full and it would honour all such awards, with the exception of those granted to the four individuals who had been executive directors at the time of the acquisition of HBOS (which included D and T), as to do so carried a risk of reputational damage.

Claim: D and T issued proceedings challenging the withholding of their shares. LB defended the claim based on a valid exercise of their powers under rule 6.4, and/or on the exclusion or 'Micklefield' clause within the LTIP (rule 15) which provided that D and T could not claim 'compensation for any loss' in relation to the LTIP where there is 'any loss or reduction of rights or expectations under the plan in any circumstances'.

No valid amendment to LTIP: The High Court granted D and T's application for summary judgment application. It found that the LTIP was not validly amended, since rule 17 was aimed at alterations (probably of a minor nature) to the structure and administration of the plan, rather than to awards under the plan.

Awards had vested: The Court also found that D and T's awards had vested by virtue of a Remuneration Committee meeting which had taken place some months before the board meeting. On a true construction of the LTIP rules, it was the Remuneration Committee (not the board) which was to determine whether the performance conditions had been met, and that was entitled to exercise a discretion as to whether to make any adjustment to the number of shares that would vest.

Micklefield clause not effective: The Court went on to find that rule 15.7 of the LTIP had to be seen as having special reference to claims which are properly characterised as employment claims, and not claims in the context of the plan generally. It found that the words of rule 15.7 were not sufficiently clear, given the context and the surprisingly extensive effect of such a construction, to deny D and T any claim.

Settlement agreements did not preclude claim: Finally, the Court held that the wording in the agreements signed in relation to D and T's retirement did not preclude their claims. The agreements effectively confirmed D and T's good leaver status and provided that their awards would be determined in accordance with the LTIP rules. It was held that the reference to the rules was, absent any reference to such terms 'as are in effect from time to time' or similar clear wording, best read as a reference to the terms then in place.

Lessons for employers: This decision is of relevance to all companies which operate share schemes, particularly as regards malus provisions. It confirms that:

- It may not be possible to amend the terms of existing awards without the consent of the award holders. Clear and specific wording will be necessary to allow a party to a contract (such as an LTIP award) to amend the contract unilaterally to the disadvantage of the other party, and any such wording will be construed narrowly.

- A decision to invoke malus should be taken by the appropriate body (board or committee, depending on the plan rules), having considered all the relevant issues and at the correct stage in the process set out in the rules (before awards are determined to have vested).

- A Micklefield clause cannot (at least without clear words) protect an employer from liability where the employer breaches the rules of the plan itself.

- Settlement terms relating to LTIP awards should always refer to the LTIP rules 'as amended from time to time' to allow for future amendments.

Failure to consider bumping on redundancy may make dismissal unfair

In a redundancy situation, the employer may in some circumstances choose to save an at-risk employee by making a colleague redundant and moving the at-risk employee into their role (so-called 'bumping'). The EAT has recently confirmed that an employer's failure to consider bumping a more junior employee in a redundancy situation may in some circumstances make the dismissal of the senior employee unfair (*Mirab v Mentor Graphics (UK) Ltd*).

Redundancy: M was a Sales Director who was made redundant by MGUK following a restructuring exercise. The Tribunal dismissed M's unfair dismissal claim, finding that redundancy was the reason for his dismissal, and that MGUK had adequately consulted, including on alternatives to dismissal (although it had not considered bumping a more junior Account Manager because M had not suggested that he would be prepared to consider such a role).

Bumping: The EAT allowed M's appeal and remitted the case back to the Tribunal for reconsideration. In relation to bumping, the EAT gave the following guidance:

- Considerations of alternatives to the redundant employee being dismissed will generally involve looking for other potential roles that are vacant at the relevant time.

- There may be cases where it might be reasonable to look for a vacancy that might be created, possibly at the expense of another employee (i.e. bumping).

- There is, however, no rule that an employer must always consider bumping in order to dismiss fairly in a redundancy case; not least as, where this might involve the employee in question being moved into a subordinate and less well paid role, that might not be seen as something that the employer should reasonably be expected to initiate.

- The question will always be for the tribunal to determine, on the particular facts of the case, whether what the employer did fell within the range of reasonable responses.

On the facts…In this case, MGUK did not, of its own initiative, suggest that M might take on the role of Account Manager, either as a straightforward alternative to his existing position or as a result of bumping another Account Manager. There was some evidence before the Tribunal that M had himself raised the position of other employees engaged as Account Managers when contending that an alternative should be found, other than making him redundant. This was despite the fact that M had previously forcefully objected to being employed in this capacity. The EAT therefore found that it was perverse of the Tribunal to conclude that there was 'no sign' that M had ever offered to take an Account Manager position. The case must therefore be remitted for reconsideration on that basis.

Bumping should be considered: This judgment gives some helpful guidance on the scope of an employer's duty to consider bumping in a redundancy scenario. The safest approach will be for employers handling a redundancy situation to always consider whether or not to bump a more junior employee to make way for a more senior employee whose position is redundant (and to raise that possibility with the senior employee), save in the clearest cases where bumping would not be feasible or appropriate.

Points in practice

BEIS inquiry into gender pay gap and executive pay

The House of Commons BEIS Committee has launched an inquiry to look at the gender pay gap and executive pay in the private sector. The inquiry comes amid concerns about the overall level of executive pay and bonuses, and in the wake of the first deadline for gender pay gap reporting (on 4th April 2018).

The inquiry will examine:

- issues around the compliance of businesses with reporting requirements on the gender pay gap, such as whether the regulations are properly capturing the salaries of staff;
- whether the annual information related to gender pay gaps is sufficient, or if any further information should be required;
- what measures should be taken against companies which do not comply with reporting requirements;
- the implementation of the Prime Minister's undertaking to crack down on excessive executive pay;
- progress made in structuring and reporting executive pay;
- the role of remuneration committees, institutional investors and shareholders in curbing excessive pay; and
- the use of 'clawback' provisions to recover cash and share bonuses in the event of poor performance by executives.

The deadline for evidence to be submitted in relation to gender pay gap reporting was 10th April. Executive pay has a slightly later deadline of 8th May.

Gender pay gap reporting: final figures revealed

The deadline for large private sector employers to publish their gender pay gap figures passed on 4th April 2018. According to the data submitted to the BEIS portal by that deadline:

- The national median pay gap in the private sector was 9.7%
- More than 10,000 employers published data.
- 78% of employers pay men more than women.
- 8% of employers reported no pay gap at all.
- The finance sector had the largest reported pay gap of 35.6%.

It remains to be seen whether the Equality and Human Rights Commission will now take enforcement action against the approximately

1,500 employers who missed the deadline and failed to report their data.

GDPR: ICO publishes guidance on legitimate interests

The Information Commissioner's Office (ICO) has published detailed guidance on legitimate interests as a basis for processing personal data. The guidance is intended to help organisations decide when to rely on legitimate interests as a basis for processing personal data (as provided for under Article 6 of the GDPR).

The guidance is split into five sections:

- **What's new under the GDPR?** The guidance notes that the GDPR does not fundamentally change the concept of legitimate interests as a lawful basis for processing. However, organisations must now be able to identify a lawful basis for processing (and in the case of legitimate interests, identify what those legitimate interests are), and document their assessment of how it applies to a particular form of processing. Further, under the GDPR the interests of any third party can now be considered (currently this basis for processing is limited to a processor's own interests or those of third parties to whom it discloses the data).

- **What are "legitimate interests"** The guidance confirms that there is no specific definition of "legitimate interests" and it may encompass a wide range of interests. However, demonstrating a legitimate interest does require an organisation or third party to have a clear benefit or outcome in mind and to ensure that the interest is actually "legitimate". The processing must also be "necessary" for the legitimate interest, in the sense that the organisation must be able to demonstrate that the processing helps the legitimate interest, and has considered whether there is a less intrusive alternative (by balancing their legitimate interests against the interests, rights and freedoms of the individual). As a minimum, organisations should consider the nature of the data being processed, the reasonable expectations of the individual, the likely impact of the processing on the individual, and whether any safeguards can be put in place to mitigate the negative impacts.

- **When can employers rely on legitimate interests?** The guidance suggests that legitimate interests may be an appropriate basis for processing where: (i) the processing is not required by law but is of a clear benefit to the organisation or others; (ii) there is a limited privacy impact on the individual; (iii) the individual should reasonably expect their data to be used in that way; or (iv) an organisation cannot, or does not want to, give the individual full upfront control (that is, by consent) or bother them with disruptive consent requests when they are unlikely to object to the processing. However, the ICO states that legitimate interests should not be used as a default basis for all processing by an organisation, despite its flexibility. The guidance also notes that relying on legitimate interests may result in more work for an organisation in order to justify the application of it as a lawful basis for processing compared to the other bases (as there is likely to be more scope for disagreement in relation to the outcome of the balancing test).

- **How can employers apply legitimate interests in practice?** The guidance states that organisations should undertake the three-part test (purpose, necessity and balancing tests), document the outcome, and keep it under regular review. This process is referred to by the ICO as a "legitimate interests assessment" (LIA), and is intended to be a simple form of risk assessment. The ICO confirms that there is no specific duty in the GDPR to undertake a LIA, however, as a matter of best practice, one should be undertaken by organisations in order to meet their obligations under the GDPR accountability principle.

- **What else do employers need to consider?** The guidance also recommends that individuals are informed of the purpose for processing, that legitimate interest is the basis being relied on, and what that legitimate interest is. Organisations' privacy notices should also be updated to reflect this. Finally, organisations should be aware of individual's rights; for example, where legitimate interests is relied on as a basis for processing then the right to data portability does not apply to any personal data being processed on that basis.

Childcare voucher scheme to close on 4th October

The government has confirmed that childcare vouchers and employer-supported childcare schemes will close to new entrants on 4th October 2018. The closure was originally scheduled for 6th April 2018, but was extended in acknowledgement of concerns about problems with the operation of the new tax-free childcare accounts.

Employer-supported childcare is being replaced by the childcare payments scheme, which is now open to all eligible parents with children under 12. After 4th October, parents already using childcare vouchers can continue to do so for as long as they remain with their employer, and their employer continues to offer the scheme.

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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