SLAUGHTER AND MAY

# Employment Bulletin

**May 2018**

Welcome to our new look Employment Bulletin. This month, our headline story looks at when an employer can validly implement a **pay freeze**, and what pitfalls to avoid. We also consider decisions of the Supreme Court demonstrating the importance of express **notice provisions**, of the EAT on **discrimination and shared parental leave**, and of the European Court on whether **travel time is working time**. We conclude with latest developments in **board-level gender diversity**, and some '**horizon scanning**'.

## Pay freeze not validly implemented

**Summary**: A two-year pay freeze imposed by the employer has been found to be invalid. Although the employees did not bring tribunal claims until two years later, they had protested through their trade unions at the time of the pay freeze. The Court of Appeal found that in these circumstances, their continuing to work could not be taken as acceptance of the change. (*Abrahall v Nottingham City Council*)

**Key practice point**: Relying on implied acceptance of a contractual change will always involve some uncertainty for the employer as to its effectiveness. This will be more so where the change is wholly detrimental to employees. Employers who choose to go down this route should make it clear to employees that if they continue to work, they will be taken to have agreed to the proposed change. A better approach will often be to implement the change via express agreement, or via dismissal and re-engagement.

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**Facts**: NCC implemented changes to its salary structure in early 2010, to equalise the salary progression terms for administrative and manual staff. Some employees expressly accepted the new terms, and the rest were dismissed and re-engaged on the new contracts. It was subsequently determined that all of the employees had a contractual right to annual salary progression following the change.

In late 2010, NCC decided to implement a two-year freeze on pay progression, to take effect in April 2011. The trade unions strenuously opposed this proposal, threatening industrial action, but NCC repeatedly

asserted that the alternative was a large number of additional compulsory redundancies. No further action was taken by the unions or any individual employee. When however NCC decided to impose a similar freeze in April 2013, the unions activated a grievance procedure. NCC denied that there was any contractual right to pay progression, but in any event said that if there had been, the employees had accepted a variation to their contract by continuing to work without protest until 2013. The grievance procedure did not produce a resolution.

A group of several hundred affected employees (together A) lodged proceedings for unlawful deductions from wages. The Tribunal dismissed the claims, and the appeal to the EAT was only successful in part.

**Decision**: The Court of Appeal allowed the appeal, finding that A had not implicitly agreed to a variation of contract. The key points were that:

- the change had been wholly disadvantageous to the employees;
- the matter had not been put to employees as something requiring their agreement (which was unsurprising given that pay terms were usually collectively agreed); and
- there had been trade union protest before and after implementation of the freeze.

In those circumstances, the Court found it hard to see how A's continuing to work could be taken as an unequivocal acceptance of a variation in their contractual terms. The Court therefore held that A were entitled to arrears of pay equivalent to what they would have earned if pay progression had been operated in each of the years in which it was frozen.

**Analysis/commentary:** While this decision gives some useful guidance on implied acceptance of contractual changes, the decision on the facts was finely balanced. The Court acknowledged that the unions had made no significant continuing objection to the pay freeze (they did not secure sufficient support for industrial action), and said it was "a great pity" that neither the unions nor their members stated unequivocally at the moment of implementation that they did not accept it and that their continuing to work was without prejudice to that position. It may therefore be that, on different facts, a delay of two years between a change being implemented and employees lodging a claim would be sufficient to amount to implied acceptance of the change.

## Why notice provisions matter

**Summary**: When does notice of termination sent by post take effect? If the contract is silent on this, the Supreme Court has now decided that notice sent by post only takes effect for contractual purposes when it is received by the employee, and the employee has either read it or had a reasonable opportunity to read it. On the facts, this meant that termination had taken place later than the employer intended, and the employee had accrued the right to an enhanced pension (*Newcastle upon Tyne NHS Foundation Trust v Haywood*).

**Key practice point**: An employment contract should include an express term as to how notices under that contract should be given, and when they will take effect. In the absence of such an express term, there will be an implied term that notice only takes effect when it is received, which may give rise to uncertainty. It is always preferable to deliver important notices (including notices of termination) personally where possible.

**Facts**: H was employed by the NHS. In early 2011 the NHS decided that H's role was at risk of redundancy, and commenced a redundancy consultation process. H went off sick on 13th April, and was then on annual leave from 19th to 27th April. In the meantime, the NHS determined that H was to be made redundant. On 20th April it sent duplicate letters to H, one by recorded delivery to her address, and one by ordinary post. The recorded delivery letter was collected from the local sorting office by H's father-in-law on 26th April, and left by him in her house that day. H only read the letter on her return from holiday on 27th April.

H's contractual notice period was 12 weeks, but the contract was silent on how notice should be given. H's 50th birthday was on 20th July 2011, and if her dismissal took effect on or after that date, she would be entitled to an enhanced pension. The dispute turned on the date on which the notice of termination was validly given; it had to be 26th April or earlier in order to deny H the enhanced pension. H claimed that it did not take effect until she read the letter on 27th April. She therefore brought proceedings seeking an order that her employment continued until 20th July and she was entitled to the enhanced pension. The High Court granted the order, as did the Court of Appeal.

Decision: The Supreme Court dismissed the appeal. It found that notice only took effect when it had actually been received by the employee, and the employee had either read, or had a reasonable opportunity of reading, the notice. It relied on the following factors in support of this approach:

- The common law rule in non-employment cases (which provided that notice was given when the letter was delivered to its address) was not as clear and universal as the NHS had suggested.
- There was no reason to suppose that the different approach taken in employment cases caused any real difficulties in practice. An employer could either make express alternative provision in the contract, or ensure notice of termination was received in sufficient time to allow the employment to terminate on a specified day.
- It was important for both employer and employee to know whether and when the employment had come to an end.

**Analysis/commentary:** At first glance it may seem that the facts of this case are exceptional, because cases do not usually turn on the precise date of delivery of a notice, and receipt usually occurs shortly after delivery. We have however had examples in practice where an employer was proposing to dismiss a number of employees in order to implement changes as part of a pension scheme closure, some of the employees were difficult to contact due to ill-health or sabbaticals, and the effectiveness (and date) of the termination was critical for section 75 purposes.

More fundamentally, from a practical perspective, this issue can be managed by inserting an express provision in the employment contract concerning how notice may be given and when it takes effect (see for example, by providing for notices given by post to take effect 48 hours after they are sent).

## Should you offer enhanced pay for shared parental leave?

**Summary**: When shared parental leave (ShPL) was introduced back in 2015, many employers chose to maintain their enhanced maternity pay policies but only offer ShPL at statutory pay. A few weeks ago, the EAT confirmed that this approach does not amount to direct sex discrimination (*Capita Customer Management v Ali*: see our Bulletin dated 20th April 2018). It seems however that a risk of indirect discrimination remains, according to the latest EAT decision on this issue (*Hextall v Leicestershire Police*).

**Key practice point**: Employers who do not give enhanced pay during ShPL at the same rate as enhanced maternity pay may be at risk of an indirect discrimination challenge. We would however suggest that employers should not change their policies until the outcome of this case on remission is known.

**Facts**: H joined LP in 2003 as a police constable. H's wife gave birth to their second child on 29th April 2015. H took ShPL from 1st June to 6th September 2015. Over that period of ShPL, he was paid at the then-applicable statutory rate of £139.58 per week. However, if H had been a female police constable on maternity leave, he would have been entitled to be paid his full salary for the period over which he took ShPL (since LP offers women on maternity leave 18 weeks full pay).

H claimed indirect sex discrimination. He relied on a provision criterion or practice ("PCP") of paying only the statutory rate of pay for those taking a period of shared parental leave. The Tribunal however dismissed his claim, finding that the comparison was with a woman on maternity leave, who was not in materially the same circumstances (having given birth to a child and being on maternity leave rather than ShPL). It also held that the PCP applied equally to both men and women taking ShPL, and that men are not disadvantaged by any PCP connected with ShPL. It therefore characterised the indirect discrimination claim as "*a non-starter*".

**Decision**: The EAT allowed H's appeal. It held that the Tribunal had erred in finding that, because the PCP applied to men and women equally, there could be no indirect discrimination. In contrast, it is the nature of indirect discrimination that the PCP applies to men and women equally. It is the resultant 'particular disadvantage' to men which must be considered in deciding a claim of indirect discrimination.

The 'particular disadvantage' in this case was that the only option for men wishing to take leave after the birth of their child was to take ShPL at the statutory rate, whereas women wishing to take such leave had the possibility of taking maternity leave at full pay. The Tribunal had wrongly identified the particular disadvantage as men receiving only statutory pay during ShPL, which was the PCP, not the particular disadvantage occasioned by it.

The Tribunal had also erred in their approach to the comparator, which was more suitable for a direct discrimination claim. The EAT found that the identifying of a pool for testing disparate impact of the application of a PCP on men and women in materially indistinguishable circumstances is a different exercise from that of deciding whether the circumstances of one chosen comparator of the opposite sex are materially indistinguishable from those of the claimant. The EAT went on to find that the relevant pool in this case should contain those police officers with present or future interest in taking leave to care for their newborn child (not just those who actually take ShPL).

The claim of indirect sex discrimination was therefore remitted for rehearing by a differently constituted tribunal.

**Analysis/commentary:** This decision reopens concerns about enhanced pay during ShPL, which had been alleviated following the recent decision in *Ali*.

It is worth noting that LP did not appeal the Tribunal's finding that the PCP, if found to be discriminatory, was not justified. If disparate impact can therefore be established, it seems the indirect discrimination claim will succeed. Employers would then need to think carefully about the need to equalise enhanced pay for maternity leave and ShPL.

## Travel time may be working time

**Summary**: When is travelling time "working time"? In the UK, the time spent by a worker travelling between home and work has traditionally not been classed as 'working time'. Then in 2015, the European Court of Justice (CJEU) decided that time spent by workers who do not have a fixed or habitual place of work travelling between their homes and the premises of the first and last customers designated by their employer constitutes working time under the Working Time Directive (WTD) (*Tyco:* see our Bulletin from September 2015). The European Free Trade Association (EFTA) Court has now extended the *Tyco* principle by deciding that the time spent travelling between home and a temporary workplace for a single assignment is 'working time' for the purposes of the WTD (*Thue v Norwegian Government*).

**Key practice point**: Where a worker has a habitual place of work, but is asked to travel from home to a different work location, that travel time should be classed as "working time". This means that employers will need to ensure employees have adequate rest breaks (in particular the entitlement to a daily rest break of 11 consecutive hours), and that they keep accurate records of such travelling time.

**Facts**: T was a chief inspector in the Norwegian police force, and was based at a rural police station. Between 2005 and 2014, T was also a member of a special response unit. During this period he undertook three assignments for the special response unit, which involved a driving distance between his home and the place where he was required to attend.

T claimed that this travelling time should have counted as 'working time' for the purposes of Norwegian Law and the WTD. His claim was rejected, and T appealed to the Supreme Court of Norway, which referred the issue to the EFTA Court.

**Decision**: The EFTA Court held that time spent travelling outside normal working hours to and/or from a location other than a worker's fixed or habitual workplace in order to carry out his activity or duties in that other location, as required by his employer, constitutes "working time" under the WTD. It rejected the Norwegian government's argument that "working time" when travelling is limited to cases where the worker does not have a fixed or habitual place of work. It found that this would jeopardise the objective of the WTD to protect the health and safety of workers.

In terms of timings, the EFTA Court held that any journey to and/or from a location other than the worker's fixed or habitual place of attendance should be deemed to have begun, and its return to have ended, either at the worker's home, or his fixed or habitual place of work, whichever is more reasonable in the circumstances. The analysis should take account of whether the journey to and/or from the location of the worker's assignment is shorter if travelling from the employee's home as opposed to his fixed or habitual place of attendance.

**Analysis/commentary:** This case extends the type of travelling time which employers may need to count as "working time". That said, it remains the case that the *Tyco* principle does not apply to travel time to and from the worker's fixed or habitual place of work.

Businesses should review their contractual arrangements with their workers to consider what payment obligations apply to travelling time:

- If the worker receives a set salary to work set hours (not including travelling to and from home), but is also required to work any additional hours as are reasonably necessary to carry out their duties, the employer may be able to argue that there is no additional right to

payment for travelling time which falls outside the set hours for which the employee is paid. This will be even clearer where the contract expressly provides that the worker is not entitled to any additional pay for travelling to and from home.

- However, where workers are paid on an hourly rate for all hours "worked", it may be more difficult for employers to avoid paying such workers for travelling time (although it may be possible to apply a different (lower) rate of remuneration to travelling time).

- Businesses must however ensure that the worker receives at least the national living wage (NLW) or national minimum wage (NMW) for all time worked.

Businesses should also consider whether additional controls are required on travelling time – for example, the employer may set the worker's appointment schedule for the day, and prescribe the most efficient route which is to be taken to attend those appointments. It may also want to make it clear to workers that travelling time which counts as working time cannot be used to conduct personal business at the beginning and end of the day (and attach disciplinary sanctions for non-compliance).

## Women on boards: the latest

The Investment Association (IA) and the Hampton-Alexander Review have called on companies to improve their gender balance, following reports that 1 in 10 FTSE 350 companies fail to meet gender diversity targets. The organisations have written to a total of 35 FTSE 350 companies which either have a male-dominated executive board, or have refused to act on the recommendations outlined in the Hampton-Alexander Review. The letters ask the companies (including BP, Persimmon, Sports Direct and TUI) to explain their poor gender balance and what steps they are taking to move towards the targets as set out in the Review (of 33% female representation on boards by 2020). The IA and Review argue that diverse companies 'typically outperform their less diverse peers and make better long-term decisions'.

Separately, one of the largest UK institutional investors, Legal and General Investment Management (LGIM) has said that it will use AGMs to vote against the re-appointment of company chairs where women fail to account for 25% of the organisation's board.

## Horizon scanning

What key developments in employment should be on your radar?

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| **25th May 2018** | GDPR comes into force |
| **Summer 2018** | FRC to publish revisions to UK Corporate Governance Code<br><br>Associated legislation due to come into force – including to require listed companies to report annually the ratio of CEO pay to the average pay of their UK workforce |
| **Summer 2018** | Taylor Review: Government consultations close |

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| 4th October 2018 | Childcare voucher scheme to close to new entrants |
| 29th March 2019 | European Union (Withdrawal) Bill due to take effect |
| 4th April 2019 | Gender pay gap reporting deadline |
| 6th April 2019 | All termination payments above £30,000 threshold will be subject to employer class 1A NICs |
| 6th April 2019 | Workers entitled to written statements of terms and itemised pay slips |
| April 2019 | Annual updates to employment rates and limits |
| Mid to late 2019 | Planned extension of the SMCR to all FSMA-authorised persons |

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Pimlico Plumbers v Smith (*Supreme Court); *Uber v Aslam* (Court of Appeal)
- **Discrimination / equal pay**: *City of York v Grosset* (Court of Appeal: disability discrimination); *ASDA Stores v Brierley* and *Sainsbury's Supermarkets v Ahmed* (Court of Appeal: equal pay); *Lee v McArthur* (Supreme Court: sexual orientation v religious discrimination)
- **Holiday pay**: *The Sash Window Workshop td v King* (Court of Appeal: carry over of entitlement)
- **Whistleblowing**: *International Petroleum v Osipov* (Court of Appeal: liability of colleagues) *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure)
- **Data protection**: *Various claimants v WM Morrison Supermarkets PLC* (Court of Appeal: vicarious liability for rogue employee)
- **Trade unions**: *IWGB v UK* (ECtHR: challenge to recognition rules); *IWGB v CAC* (High Court: recognition by 'de facto' employer in outsourcing): *Kostal v Dunckley* (Court of Appeal: inducements); *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)

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