SLAUGHTER AND MAY

Employment Bulletin

July 2018

Welcome to the July edition of our Employment Bulletin. This month, our headline item is new **corporate governance reporting requirements**. We also consider how an employer should handle **misconduct by a disabled employee**, and when/how it can access an **employee's online accounts** to check for confidential information. We examine when a **whistleblower** has given sufficient information to make a protected disclosure, provide a summary of the latest cases on **employment status**, and conclude with some **horizon scanning**.

New corporate governance reporting requirements

Summary: New draft legislation has been published to implement a package of corporate governance reforms included in the BEIS Green Paper on Corporate Governance. The legislation will (amongst other things) require quoted companies with more than 250 employees to report annually on the ratio of CEO pay to the average pay of their UK workforce.

Key practice point: Companies should start familiarising themselves with the new regime. The legislation will apply to companies with accounting periods beginning on or after 1st January 2019, meaning that companies will need to start complying with the new reporting requirements from 2020 onwards.

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What's new? The Companies (Miscellaneous Reporting) Regulations 2018 (the Regulations) have been published in draft and laid before Parliament. Subject to Parliamentary approval, the Regulations will introduce the following key changes:

- **CEO to employee pay ratios**: Quoted companies with more than 250 UK employees will be required to publish, as part of the directors' remuneration report, a table setting out the ratio of their CEO's total remuneration to the median (50th), 25th and 75th percentile full-time equivalent remuneration of their UK employees. The Regulations set out three options for how these

percentile remuneration figures may be calculated. Companies will also have to publish supporting information, including information relating to the choice of calculation method, the reasons for any changes to the ratios from year to year and, in the case of the median ratio, whether, and if so why, the company believes this ratio is consistent with the company's wider policies on employee pay, reward and progression. For a parent company, the information must relate to the group as a whole.

- **Share price impact on pay:** Quoted companies will need to report how much of a director's pay award is attributable to share price growth, and state whether discretion has been exercised in relation to that award due to changes in share price. Quoted companies will need to include in the remuneration policy an indication, in relation to multi-year performance measures or targets, of the maximum remuneration receivable by executive directors assuming share price growth of 50% during the performance period.

- **Employee engagement:** All companies with 250 or more UK employees will be required to report on the extent of the company's employee engagement. They must describe the action taken to introduce, maintain or develop arrangements aimed at informing and consulting employees in various specified ways, relating primarily to the company's performance and financial and economic matters affecting that performance. There is an exception which will not require disclosure of any impending developments which would, in the opinion of the directors, be seriously prejudicial to the company's interests.

- **Corporate governance statement:** All companies which have more than 2,000 employees, or a turnover of more than £200m and a balance sheet total of more than £2bn, will be required to publish an annual statement of corporate governance arrangements. The statement must specify which corporate governance code the company applied in the financial year in question, and how and why they departed from the code at any stage. If they did not apply a corporate governance code, they would need to say that, and explain what arrangements for corporate governance were in fact applied.

- **Directors duties:** All companies (except medium-sized companies) will need to include a statement in the strategic report on how the directors have had regard to the matters set out in section 172 of the Companies Act 2006 in the exercise of their duties.

The government has also published guidance and Q&As on the Regulations.

Separately, the Financial Reporting Council (FRC) has published for consultation draft corporate governance principles for large private companies (to be known as the Wates Principles). This was another recommendation from the Green Paper. The consultation closes on 7th September 2018, and it is intended that the final Wates Principles will be published in December 2018, to align with the introduction of the Regulations.

Analysis/commentary: It remains to be seen whether the reforms will meet the stated aims of building confidence in the way that large private and quoted companies are run, and seeking to increase boardroom accountability. The greatest change is likely to be felt by unlisted and private companies, given the extensive pay and other corporate governance reporting requirements which already apply to listed companies. The ratio between average CEO and employee pay is already quite widely reported in the press, and shareholders have for some years now been more active In seeking to curb executive pay packages that they perceive to be excessive. Gender pay gap reporting was only

recently introduced, and it is not yet clear how much of a difference that will make to reducing the overall gender pay gap. It remains to be seen whether CEO to employee pay reporting will become just another statistic in the same vein.

Misconduct by disabled employee

Summary: Dealing with employees who may be disabled under the Equality Act 2010 (EA 2010) is one of the most difficult areas of employment law in practice. Not only do employers need to assess whether the employee is indeed 'disabled' under the EA 2010, but they need to be aware of the risk that any action taken in relation to that employee may amount to discrimination. The Court of Appeal has recently confirmed that employers may be liable for disability discrimination by taking action in response to employee misconduct, even if they did not know that the employee's disability caused the misconduct (*City of York Council v Grosset*).

Key practice point: Once employers are on notice of a disability, they will be exposed to liability for any unfavourable treatment, even if the link between that and the disability is not immediately apparent. Employers should therefore ensure that they seek appropriate medical evidence before taking disciplinary action.

Facts: G was employed by CYC as Head of English at a secondary school. He suffered from cystic fibrosis, and CYC accepted that that he was a disabled person. In 2013 a new Head Teacher (C) was appointed at the school, and G was required to take on additional workload and other pressures. G's health deteriorated until he was signed off at the end of November 2013.

C then discovered that some weeks earlier, G had shown the 18-rated film *Halloween* to a group of vulnerable 15 and 16 year old students in one of his lessons. G accepted that this had been inappropriate, but argued that he had been affected by stress, contributed to by his cystic fibrosis. G was summarily dismissed and lodged a claim of discrimination arising from disability under section 15 EA 2010.

The Tribunal upheld G's claim. Having regard to the medical evidence before it – which was fuller and more relevant than that which CYC had when making its decision - the Tribunal found that G had shown the film while suffering from an impaired mental state due to stress. It was satisfied that the error of judgement for which G was dismissed arose as a consequence of his disability (although it also found that CYC was unaware at the time it decided to dismiss that G's misconduct was linked to his disability). Although CYC had legitimate aims in terms of safeguarding children and maintaining disciplinary standards, dismissal was not a proportionate response when the disadvantage to G was put into the balance. The dismissal was therefore an act of disability discrimination. The EAT upheld that decision.

Decision: The Court of Appeal dismissed CYC's further appeal. It held that the only knowledge requirement for a claim under section 15 is that the employer have actual or constructive knowledge of the fact that the claimant is disabled. The causal link between the employee's disability and the unfavourable treatment is an objective one. In effect, section 15 entails two distinct causative issues:

(i) *Did the employer treat the employee unfavourably because of an (identified) 'something'?* In this case, G was treated unfavourably by being dismissed, because of his error of judgment in showing the film.

(ii) *Did that 'something' arise in consequence of the employee's disability?* This is to be judged objectively, not subjectively. In this case, G showed the film as a result of the exceptionally high stress he was subject to, which arose from the effect of his disability when new and increased demands were made of him at work. The employer did not need to know, when choosing to subject the employee to the unfavourable treatment, that the relevant 'something' arose in consequence of the employee's disability.

Analysis/commentary: This case illustrates the pitfalls awaiting employers who are aware of an employee's disability but not of the full effects and consequences of that disability. This is an area in which an occupational health referral can be of real assistance to employers. In this case G's referral to occupational health was delayed until he was already on sick leave, and did not assist CYC when it came to the decision to dismiss. Although CYC was not criticised for not having obtained the evidence which the Tribunal later relied on, this evidence was pivotal to the claim.

Can an employer access its employees' online accounts to protect its confidential information?

Summary: The increasing use of technology and online accounts can make it more difficult (and more important) for employers to keep tabs on their confidential information. But where should they draw the line when it comes to monitoring their employees? The High Court has recently found that an employer who accessed a departing employee's iCloud account to check whether he held any company information had been entitled to act to protect the company's interests. However, the employer had breached its duty of care to the employee by altering security details so that the employee was unable to access his internet accounts (*Richmond v Selecta Systems Ltd*).

Key practice point: Employers should maintain a comprehensive information security/data protection policy, so that staff and managers alike are clear about what actions are permitted in relation to the company's data. Managers should also receive appropriate training so that they do not overstep the mark, as happened in this case.

Facts: R was employed by SS as a sales representative. In 2016, the parties entered into negotiations as to the terms on which R would leave the company. This included the amount of compensation to be paid to R in return for not taking confidential information. R handed over his company phone and gave SS the password for unlocking it. SS claimed that R had also given it his passwords to his Apple and AOL email accounts, which R denied.

SS accessed R's accounts to check for company information, and found some in the iCloud. It therefore reset the password in order to prevent R from accessing the information from another device. This had the effect of locking R out from his personal AOL email account, Apple iTunes account, LinkedIn account and WhatsApp account.

R lodged proceedings claiming that SS had breached the settlement agreement by failing to pay his compensation on termination, and had unlawfully interfered with his online accounts. SS denied the existence of any such agreement and accused R of soliciting business from its customers for his own benefit.

Decision: The High Court rejected R's claim as regards the settlement agreement. It agreed with SS that no final agreement had been reached regarding the amount of compensation payable to R, nor as to the terms of the confidentiality clauses required by SS.

The Court also found that SS had been entitled to protect its business and interests by accessing R's phone and iCloud to discover whether there was any company information on it (and if necessary to delete it).

However, the Court found that SS had breached its duty of care to R by altering important security details of R's internet account. The fact that R had given his phone password did not authorise SS to make those changes. The Court accepted that SS had not set out deliberately to injure R, but had acted to protect its interests. The Court also noted that SS's managing director was not an expert in IT or Apple technology, and as he was interfering with systems which he did not fully understand, he should have sought further advice or discussed the matter further with R. Instead he went on and took steps which affected R's use of his personal internet accounts, which ultimately could not be retrieved (R had tried to reinstate the original password but had failed). This was a breach of the duty of care owed to R. The Court awarded R £1,000 in damages, based on loss of access to R's iTunes library and the inconvenience of being unable to access his accounts.

Analysis/commentary: Employers should take some comfort from this decision, insofar as it suggests that they may be entitled to gain access to employees' online accounts and delete any confidential information they find there. Employers must however be very careful not to cause damage when accessing the accounts, and should deploy expert IT specialists to do so.

Whistleblowing: how much information is required?

Summary: A 'protected disclosure' for whistleblowing purposes must involve the disclosure of 'information' by the worker. Previous cases have suggested that making mere 'allegations' will not satisfy this criterion. However, the Court of Appeal has recently confirmed that the key question is not whether the disclosure was of 'information' or an 'allegation', since the two terms are not mutually exclusive. Instead, the relevant question is whether the disclosure has sufficient factual content and specificity to be capable of tending to show one of the six relevant failures set out in the legislation. This can be achieved by looking at the context in which the disclosure was made, not just the words used (*Kilraine v Wandsworth LBC*).

Key practice point: Context is important when identifying a protected disclosure. A generic statement may be found to contain sufficient factual information when account is taken of the particular context in which it is made (for example any gestures that may have been communicated at the same time).

Facts: K was employed by WLBC as an education achievement manager. K claimed that she had made four protected disclosures and as a result she had been dismissed and had suffered detriments. The Tribunal rejected K's arguments, finding that her redundancy was genuine and not as a result of any protected disclosure. It also found that two of her alleged disclosures were not 'protected', on the basis that they contained allegations and not information. These disclosures were:

(i) a letter written by K to the assistant director of children's services at WLBC stating that it was failing in its legal obligations towards her in respect of bullying and harassment and that there had been '*numerous incidents of inappropriate behaviour towards me, including repeated side-lining*'; and

(ii) an email to WLBC's HR department in which K complained of a lack of support from her line manager when she raised a safeguarding issue concerning a particular school.

The EAT upheld the Tribunal's decision.

Decision: The Court of Appeal dismissed the appeal. It confirmed the following principles:

- The concept of "information" as used in section 43B(1) of the Employment Rights Act 1996 is capable of covering statements which might also be characterised as allegations.

- In order for a statement to be a qualifying disclosure, it must have sufficient factual content and specificity to be capable of tending to show one of the matters listed in section 43B(1)(a)-(f) (i.e. a criminal offence, danger to health and safety or the environment, miscarriage of justice, breach of any other legal obligation, or deliberate concealment of any of the above).

- If the worker subjectively believes that the information they disclosed tends to show one of these listed matters, and their disclosure has sufficient factual content and specificity such that it is capable of tending to show that matter, it is likely that the requirement for their belief to be 'reasonable' will also be satisfied.

On the facts, the Court agreed with the EAT and the Tribunal that K's letter simply did not contain the relevant minimum factual content to satisfy the s.43B test (and K had not identified any relevant context which might inform or supplement its meaning). In contrast, the email did involve disclosure of matters which had sufficient factual content. However, the Tribunal was entitled to hold that the information was not such as tended to show one of the relevant matters under section 43B(1). It was not suggested that WLBC's statutory safeguarding duties were relevant to the issue, and the Tribunal was entitled to find that K did not have a relevant legal obligation in mind at the material time. To say that one of WLBC's officers might have been unsupportive in responding to a safeguarding issue was not indicative of a failure by WLBC to make appropriate general arrangements in accordance with its statutory obligations.

Analysis/commentary: This decision confirms that, when facing a whistleblowing claim, employers cannot dismiss it simply on the basis that it contains an allegation. It is important to consider whether an allegation made by an employee also contains specific facts which could be held to be information, and thereby potentially satisfy the protected disclosure test.

It is also important to be aware of the context in which the disclosure is made, as this may affect the factual content of the disclosure. The Court of Appeal gave the example of a worker who brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says '*You are not complying with Health and Safety requirements*'. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. The statement would derive force from the context in which it was made and, in the Court's view, taken in combination with that context, would constitute a qualifying disclosure (otherwise this sort of general disclosure would generally not be sufficient to amount to a protected disclosure).

Employers should therefore seek to determine the context in which a disclosure is made (for example considering what was done, as well as what was said), in analysing whether the disclosure is likely to be protected.

Employment status: the latest

Three recent cases have continued the trend for gig economy staff to be classified as "workers" rather than self-employed.

Pimlico Plumbers v Smith: the Supreme Court confirmed that a plumber working on behalf of a plumbing company, was a "worker" within the meaning of the Employment Rights Act 1996 and in "employment" under the Equality Act 2010, and not, as his contract suggested, a self-employed contractor (see also our email alert of 13th June 2018). The Court found that Mr Smith was obliged to provide his services personally to Pimlico, and that Pimlico was not for these purposes a client or customer of any business undertaken by Mr Smith.

The implication for businesses is that if a 'contractor' is allowed to replace himself only with another 'approved' operative working for the same business, the 'contractor' will be subject to a personal service requirement (and may therefore be a 'worker'). Further, tight contractual controls on the conduct of the 'contractor' will increase the risk that the business is not a client or customer of the 'contractor's' business, and that he is in fact a 'worker'. Restrictive covenants should be viewed as a particular 'red-flag' in contractor agreements.

Addison Lee Ltd v Gascoigne: the EAT confirmed that a cycle courier was a "worker" for the purposes of the Working Time Regulations 1998. It found that the contract purporting to establish the courier as a self-employed independent contractor did not reflect the reality of the parties' legal relationship. The couriers in this case had far less flexibility than the riders in the *Deliveroo* litigation (see below), who could refuse a job (or send a substitute) at any time and for any reason. They were found not to be workers on this basis.

This judgment is a reminder that, when assessing employment status, the terms of the contract will be disregarded if they do not reflect the reality of the relationship. It is more important to analyse the established practice and expectations of the parties, and how the relationship works 'on the ground'.

Leyland v Hermes Parcelnet Ltd: most recently, an employment tribunal ruled that a group of Hermes couriers were "workers" and, as such, were entitled to be paid the National Minimum Wage, receive holiday pay and reclaim unlawful deductions from their wages. The couriers were contractually obliged to ensure that parcels were delivered on their rounds on the days for which they were responsible. They had to either deliver them themselves or provide somebody else to do so. That distinguished this case from others involving Uber, Deliveroo and Pimlico Plumbers, where it was accepted that there was no obligation on the individuals to provide work on any particular day.

Although the terms of the written agreement attempted to outline an unfettered right of substitution, this was found to be a '*wholesale attempt to portray the couriers as not satisfying limb (b)*' (i.e. the worker test). In reality, the couriers could only send a substitute if Hermes approved their choice (and Hermes retained the right to veto, which it exercised in practice). This was found to be consistent with the couriers being subject to an obligation of personal service. The fundamental essence of the contract lay in the field of dependent work relationships, not in the field of two independent business undertakings. The couriers were therefore found to be "workers".

Where are we now? The current state of the case law on employment status in the gig economy is summarised in the table below. So far, the trend is in favour of finding worker status, save where a genuine right of substitution exists (as it was found to in the *Deliveroo* case).

Case	Outcome	Status
Pimlico Plumbers v Smith	Worker	Supreme Court
Uber BV v Aslam	Worker	Employment Appeal Tribunal (EAT): Court of Appeal hearing due October 2018
Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)	Self-employed	High Court
Addison Lee Ltd v Gascoigne	Worker	EAT
Leyland v Hermes Parcelnet Ltd	Worker	Employment Tribunal (ET)
Lange v Addison Lee Ltd	Worker	ET
IWGB v The Doctors Laboratory Ltd	Worker	ET
Boxer v Excel Group Services	Worker	ET

The government's employment status consultation (see our separate **briefing**) closed on 1st June, and the government's response is awaited with interest.

Horizon scanning

What key developments in employment should be on your radar?

July 2018	FRC to publish revisions to UK Corporate Governance Code
4th October 2018	Childcare voucher scheme to close to new entrants
1st January 2019	Revised UK Corporate Governance Code due to take effect 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
29th March 2019	European Union (Withdrawal) Act 2018 due to take full 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**: *Uber v Aslam* (Court of Appeal)
- **Discrimination / equal pay**: *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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