SLAUGHTER AND MAY

Employment Bulletin

August 2018

Welcome to the August edition of our Employment Bulletin. This month, our headline item is a European case about how collective redundancy consultation operates in group structures. We also consider disability discrimination in the context of employee references. We look at the employment aspects of the revised corporate governance code and examine two Supreme Court cases on employers' vicarious liability for actions of their employees. We report on a rare example of a discrimination claim based on a philosophical belief, before concluding with some horizon scanning.

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Collective redundancy consultation in group structures

Summary: Employers are required to undertake collective consultation if they are proposing to make 20 or more redundancies at one establishment within a period of 90 days or less. The obligation falls on the employer, so where a parent company proposes redundancies, it will be the subsidiary that has to inform and consult. UK law is based on the European Collective Redundancies Directive but there is no equivalent in UK law to wording in the Directive under which the obligations "*apply irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer*".

The European Court of Justice (CJEU) has ruled this week on what is meant by a decision taken by an "undertaking controlling the employer", saying it covers all undertakings linked to the employer by shareholdings or other legal connections in a way which allows the controlling undertaking to exercise decisive influence in the employer's decision-making and to compel the employer to contemplate or plan for collective redundancies (*Bichat v Aviation Passage Service Berlin*).

Key practice point: Employers within group structures that make them subject to a controlling undertaking should ensure they maintain good lines of communication with that undertaking. If a decision of the controlling undertaking makes it necessary for the employer to effect redundancies, that will require the employer to start the information and consultation process if it has not already done so.

Facts: A group of employees (together B) worked at Berlin Tegel Airport for APSB. APSB was controlled by another undertaking, Global Ground Berlin (GGB).

In September 2014 GGB informed APSB of its decision that APSB was to cease its operations at Tegel Airport from March 2015, and that part of its business was being transferred to an undertaking outside the group. As a result, APSB's contracts to perform its operations at Tegel Airport would come to an end. The new undertaking would not be taking on any of the members of APSB's staff.

In January 2015 APSB informed its works council of its intention to make collective redundancies as a result of GGB having given notice to terminate its contracts. It added that it had not been informed by GGB of the reasons leading to that notice being given, but that it assumed that this was because of continuing high losses, which it had proved impossible to reduce. Shortly afterwards, APSB ceased its activities, although the redundancies did not in fact take place until some months later.

B then brought proceedings claiming that their dismissals were unlawful, since no proper reasons had been given. The Berlin Labour Court ruled that the dismissals were lawful but the appeal court decided to refer the case to the CJEU on the meaning of a controlling undertaking.

Decision: The CJEU's decision is that controlling undertaking covers all bodies which are able to require the employer to make the decision to contemplate or plan collective redundancies, either because the undertaking belongs to the same group or they have a shareholding that gives a majority vote in general meetings and/or in the employer's decision-making bodies. Even if an undertaking does not have a majority of votes, if it is nevertheless able to exercise "decisive influence" in terms of a decision to make collective redundancies (perhaps because ownership of the company is dispersed or there is a relatively low level of participation by members at general meetings), then it will be a controlling undertaking. However, a simple factual common interest or a contractual relationship between the two companies, without a decisive influence on dismissal decisions taken by the employer, would not be sufficient to amount to control.

Analysis/commentary: Given the lack of a definition in the European Directive, the broad approach taken by the Court to the concept of a controlling undertaking is not in itself surprising. A legalistic approach could not take account of the divergences in company law that exist at member state level and the need for the expression to be given an autonomous interpretation throughout the EU.

The UK courts will now need to determine whether UK legislation can be interpreted so as to incorporate these principles. In the meantime, the cautious approach for employers will be to start a collective redundancy consultation process as soon as it becomes aware of the adoption of a strategic or commercial decision which compels it to contemplate or plan for collective redundancies.

At an earlier stage of the case (the formal Opinion of the Advocate General), it was suggested that in most cases the employer will be required to disclose the economic or other grounds on which the controlling undertaking has taken its decisions. However, the Court itself decided that it did not need to consider this issue. Nevertheless, under UK law the employer has to give employee representatives reasons for the dismissals and it may not be sufficent to say that the employer needs to make

redundancies because they have been told to. It is therefore important for employers to remain close to the controlling undertaking to understand what they are doing and why. This may be problematic, particularly if the controlling undertaking is based in a country where there is no culture of collective consultation.

Withdrawing offer based on negative and inaccurate reference was disability discrimination

Summary: Discrimination 'arising from a disability' under section 15 of the Equality Act 2010 is very broad in scope and arises when an employee (current, former or prospective) who has a disability is treated unfavourably by an employer and the employer cannot justify that treatment. The EAT recently decided that an employee had suffered discrimination under section 15 when a conditional offer of employment was withdrawn following a negative and inaccurate reference provided by a former employer (*South Warwickshire NHS Foundation Trust v Lee*).

Key practice point: This case demonstrates the pitfalls involved in providing and acting on references. The employer who provided the negative reference was also found to have discriminated against the employee.

Facts: Two references from former employers led to the withdrawal of the job offer. The first reference alluded to the employee's significant absence levels as a result of knee arthritis, which that former employer had treated as a disability for Equality Act purposes. There was a second reference from a subsequent employer, which was very negative of the employee's performance and capabilities, without making any reference to her health or absences.

The decision maker in the prospective new employer had been influenced by both references. Although the second reference may have had a greater impact, the first had more than a 'trivial impact' on the decision to withdraw the job offer (which is all that was needed for section 15 purposes). It was found to be unduly negative and inaccurate in a number of respects; the overall tenor of the reference was an unnecessary (and repeated) emphasis on sickness, when a reference should provide a balanced overview of an individual's capabilities. It followed that both the provision of that first reference and the withdrawal of the job offer in (partial) reliance on that reference were 'unfavourable treatment' for section 15 purposes.

The prospective new employer had sought to justify its actions, relying on the legitimate aim of recruitment of an employee who was capable in all respects of undertaking the requirements of the role, in particular because the employer was bound to comply with social care regulations. The EAT accepted this aim as legitimate, but found that the withdrawal of the job offer was not a proportionate means of achieving that aim, given that the employer did not make further enquiries of Occupational Health about any reasonable adjustments that could be made, and did not make sufficient efforts to contact the author of the reference to obtain further information.

Analysis/commentary: A new employer, when faced with a reference which focuses on a candidate's health issues and absences, must be alive to the risk of a disability discrimination claim. Good practice would involve seeking further information from the provider of the reference, and more information

about the candidate's health and its impact on their ability to carry out the new role (perhaps from Occupational Health, and/or from the candidate), before acting on the reference.

Employers should also ensure they record their reasons why any job offer is withdrawn. The prospective employer in this case would not have been liable for disability discrimination if it had been able to prove that its decision had been solely because of comments made in the second, non-health related, reference.

Revised UK Corporate Governance Code

Summary: On 16th July 2018, the Financial Reporting Council (FRC) published the 2018 UK Corporate Governance Code, which it describes as "the new shorter, sharper Code". Key changes to the previous 2016 version of the Code cover the relationship between companies and their workforces, company culture, succession and diversity, and remuneration.

For an overview of the revised Code, see the attached briefing. We have summarised the key employment aspects in the box below.

The FRC has also published revised "Guidance on Board Effectiveness". The Guidance is intended to support boards and companies to achieve high standards of governance. It contains suggestions and questions to stimulate board discussion.

Key practice point: The new Code will apply to accounting periods commencing on or after 1st January 2019. Although the first reporting against the new Code will not be seen until 2020 (unless companies decide to adopt all or part of the new Code early), most companies will need to establish processes for compliance within the next few months. One priority will be to devise a strategy for meaningful workforce engagement. The FRC expects that future remuneration policies and changes to existing ones should be developed with reference to the new Code.

Analysis/commentary: From an employment law perspective, the key provisions are:

- **Workforce engagement**: companies should engage with the workforce through one, or a combination, of three methods: a director appointed from the workforce; a formal workforce advisory panel; and a designated NED. There should be a means for the workforce to raise concerns in confidence and – if they wish – anonymously. The board should describe in the annual report how the interests of the company's key stakeholders (including the workforce) have been considered in board discussions and decision-making.

- **Diversity**: the new Code strengthens the role of the nomination committee on succession planning and establishing a diverse board. It identifies the importance of external board evaluation for all companies. The annual report should describe the work of the nomination committee, including the policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives; and the gender balance of those in senior management.

- **Executive remuneration**: remuneration committees should take into account workforce remuneration policies when setting director remuneration. Remuneration schemes and policies should enable the use of discretion to override formulaic outcomes. Share awards granted to executive directors should be released for sale on a phased basis and be subject to a total vesting and holding period of five years or more. The remuneration committee should develop a formal policy for post-employment shareholding requirements encompassing both unvested and vested shares. The criteria for remuneration policies and practices have become more demanding and now include reputational and other risks from excessive rewards.

Bank vicariously liable for alleged assaults by doctor making pre-employment examinations

Summary: The Court of Appeal has upheld a decision of the High Court that a bank was vicariously liable for alleged sexual assaults committed by a doctor engaged to carry out pre-employment medical assessments and examinations, even though the doctor was an independent contractor (*Barclays Bank plc v Various Claimants*).

Key practice point: The case confirms that the existence of an independent contractor is not a defence to a vicarious liability claim. Businesses should ensure they include indemnities in agreements with contractors and/or insure against liability for their actions.

Decision: The Court of Appeal held that the High Court had correctly applied the two stage test for employers' vicarious liability:

- There was a sufficient relationship between the bank and the doctor (B).
- The alleged assault was sufficiently closely connected with that relationship.

Although B was not employed by the bank, the Court of Appeal found that their relationship was "akin to employment", relying on the established five criteria:

1. The bank was more likely to have the means to compensate the victim than B. B's estate had long since been distributed and the bank was the only available compensator. The High Court had been correct to consider the bank's means but had rightly given it little weight.
2. The alleged assaults would have been committed as a result of activity being taken by B on behalf of the bank. B's work was for the benefit of the bank, to ensure that those who were employed by the bank were medically suitable for service and were recommended for life insurance at ordinary rates.
3. B's activity was likely to be a part of the business activity of the defendant. B was an integral part of its business activity.
4. The bank, by employing B to carry on the activity, created the risk of the alleged results.

5. B was, to a greater or lesser degree, under the control of the bank. The bank was directional in identifying the questions to be asked and the physical examinations to be carried out.

On the second stage test, the Court of Appeal agreed with the High Court that, on the facts, the alleged assaults were sufficiently closely connected with B's quasi employment by the bank.

The Court of Appeal rejected the bank's submission that B's status as an independent contractor was a defence to the claim – there can be vicarious liability even if there is an independent contractor. The Court noted the widespread changes in employment structures and that operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, with precise obligations and high levels of control. Although a 'bright line' test based on the status of independent contractors would make it easier for the parties and insurers, this could not displace established case law.

Analysis/commentary: This decision provides another example of how vicarious liability can extend outside the classic employer-employee relationship, to third parties engaged by the employer. It demonstrates the importance of an employer seeking indemnity protection from the third party, and insurance to cover any liability which it may not recover under the indemnity. Any recruitment of employees might be said to be part of 'business activity', so vicarious liability could in theory extend to independent service providers involved in the recruitment process. However, much will turn on the facts of each particular relationship.

Employer does not owe duty of care to employees in third party litigation

Summary: The Supreme Court held that a Police Commissioner did not owe a duty to her officers to take reasonable care to protect them from economic and reputational harm, in circumstances where the Commissioner was the subject of proceedings following the officers' alleged misconduct (*James-Bowen v Commissioner of Police of the Metropolis*).

Facts: A suspected terrorist, BA, brought civil proceedings claiming that the Commissioner was vicariously liable for alleged assaults by officers during BA's arrest. Although they were not parties to the case, the officers met with the Commissioner's barrister and were allegedly assured that the Commissioner's legal advisers were also acting for them.

The claim was settled with an admission of liability by the Commissioner and an apology for the officers' "gratuitous violence". The officers claimed against the Commissioner seeking compensation for reputational, economic and psychiatric damage on the basis that the Commissioner had a duty of care which required her to take reasonable care to safeguard their health and reputation when defending BA's claim.

The High Court struck out the claim but the Court of Appeal held it was arguable that the Commissioner did owe a duty of care, based on the implied duty of trust and confidence between employer and employee. The Commissioner appealed.

Decision: The appeal was allowed. The existing implied duty of trust and confidence does not cover the manner in which an employer conducts litigation and the extension of the duty to cover this new situation would not be fair, just and reasonable, in particular because:

- The duty would give rise to a conflict of interest, given that the interest of an employer sued on the grounds of vicarious liability for the tortious actions of their employees differs fundamentally from the employees' interests. An employer must be able to make its own investigation into a claim and assess its strength based on the employee's conduct and the prospects of a successful defence.

- Parties should be able to resolve litigation without fear of incurring liability to third parties. The proposed duty would be inconsistent with the encouragement of settlement of claims; could result in delay of proceedings; and would be a "fruitful source of satellite litigation".

Analysis/commentary: Although the case concerned police officers, who hold public office and are not employees, the Supreme Court proceeded on the basis that the Commissioner and officers were employer/employee, so the case has general relevance – in the private as well as the public sector.

The decision is reassuring for employers facing potential claims based on the alleged wrongdoing of employees. It confirms that employers are entitled to defend claims in any way they think fit, even if employees will be subjected to public criticism as a result. Having said that, the warning to avoid assumption of responsibility for employees in this situation still stands. Employers should keep employees informed but encourage them to take independent advice (and in many scenarios, particularly where there is an investigation by a regulator, employers may fund the employee's separate advice).

Employee who refused to sign copyright agreement was not discriminated against because of her philosophical belief

Summary: Religion or belief is a protected characteristic under the Equality Act 2010 (EA 2010). 'Belief' includes any religious or philosophical belief. There are certain criteria for assessing whether something is a philosophical belief, but employment tribunals have found a wide range of beliefs to be protected, including climate change; anti-fox hunting and a belief in the proper use of public money in the public sector. However, the EAT has confirmed that an employee was not discriminated against on the grounds of her religious or philosophical belief when she refused to sign a standard contract clause assigning to her employer the copyright in work she created in the course of her employment (*Gray v Mulberry Company (Design) Ltd*).

Facts: The claimant, G, a writer and film-maker, was part of a team that had access to some of the employer's designs prior to their launch. She was dismissed for failing to sign a Copyright Agreement when she started employment; signing was a condition of her continued employment. The Agreement conferred rights on the employer in respect of works created by G in the course of her employment.

G refused to sign the Agreement because of her professed belief in "the statutory human or moral right to own the copyright and moral rights of her own creative works and output". She argued that this amounted to a philosophical belief and that she had been discriminated against because of this belief.

The Tribunal and EAT both rejected the claim of direct discrimination on the basis that her dismissal was due to her failure to sign the Agreement and not because of her philosophical belief. As regards indirect discrimination, there were three reasons to reject the claim:

- G's belief was not a 'philosophical belief' within the meaning of the EA 2010. G had not done anything in relation to her employment that amounted to an expression of her belief, and therefore, based on the criteria established by the case law, she did not satisfy the requirements for showing that she had this belief. In particular, the belief did not "attain a certain level of cogency, seriousness, cohesion and importance".

- The requirement to sign the Agreement was not shown to have put others sharing her belief at a disadvantage (in fact, there was no evidence of anyone else sharing the belief) so the necessary 'group disadvantage' was not present.

- In any event, the defence of justification applied. The requirement to sign the Agreement was a proportionate means of achieving the legitimate aim of protecting the employer's intellectual property. The Agreement went no further than necessary to protect the employer's interests. Whilst the impact on G refusing to sign was severe, the employer's interests as a design company, in seeking to protect its intellectual property and in ensuring that employees were aware of their obligations, were correspondingly greater.

Analysis/commentary: The decision is a useful summary of the issues to be considered when deciding if a belief has sufficient weight to attract protection under the EA 2010. The focus has to be on the manifestation of the belief. The tribunal found that she had not at any stage made her belief known to the employer. Whilst the refusal to sign the agreement might have been dictated by G's belief, it did not amount to a manifestation of it. Her only stated reason for her refusal to sign was her concern that the employer would obtain rights over her private creative output and a commercial concern that signing the agreement might make it more difficult for her to sell her work to others. G's actions had done little more than indicate that she was concerned about 'copyright theft'.

The EAT's finding that there was no 'group disadvantage' is notable, as there have been split views on whether this is necessary for a claim to succeed. Clearly group disadvantage is more likely to be an issue in philosophical than religious belief cases, since it would be rare for someone to bring an indirect religious discrimination claim based on a belief that no one else shares.

Horizon scanning

What key developments in employment should be on your radar?

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)
- **Collective consultation**: *Seahorse Maritime Ltd v Nautilus International* (Court of Appeal: territorial scope of employer's obligations)
- **Vicarious liability**: *Bellman v Northampton Recruitment Limited* (Court of Appeal: liability for assault after Christmas party)

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