SLAUGHTER AND MAY

Employment Bulletin

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No discrimination in failure to enhance shared parental pay

Summary: The Court of Appeal held that there was no sex discrimination in arrangements whereby men on shared parental leave were paid at a lower rate than women on maternity leave (*Ali v Capita Customer Management Ltd and Leicestershire Police v Hextall*).

Key practice point: 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 Court of Appeal has now confirmed that employers who do not give enhanced pay during ShPL at the same rate as enhanced maternity pay are not in breach of the Equality Act 2010 (EA 2010). The two types of leave are different, and women on maternity leave enjoy special protections.

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Facts: The claimants, A and H, wanted to take ShPL. Their employers offered the statutory rate of shared parental pay to those taking ShPL but enhanced maternity pay to women taking maternity leave (ML) – 14 weeks' full pay (*Ali v Capita Customer Management*) and 18 weeks' full pay (*Hextall v Leicestershire Police*). A and H brought direct discrimination claims. H also claimed indirect discrimination.

After their claims were unsuccessful in the tribunals, A and H appealed to the Court of Appeal.

Decision: The Court of Appeal dismissed A and H's appeals, deciding that:

- There was no direct sex discrimination, because a man on parental leave is not in comparable circumstances to a birth mother on maternity leave.

  A had argued that, after the two-week period of compulsory leave, ML for the following 12 weeks was for childcare purposes only and was comparable with ShPL. The Court of Appeal disagreed, confirming that the purpose of ML and full pay for 12 weeks was not to enable a woman on ML to care for her child, but was for the health and wellbeing of the mother. The proper comparator for

A's direct discrimination claim was not a female employee who wished to leave work to look after her child, but a female employee on ShPL. There was no direct discrimination, therefore.

- The claim in *Hextall v Leicestershire Police* should have been brought as an equal pay claim under section 66 of the EA 2010, rather than an indirect discrimination claim. Section 66 implies a "sex equality clause" into employees' contracts of employment, modifying the terms to include the more favourable terms of a comparator of the other sex. However, H could not make a section 66 claim because there is an exclusion for special treatment relating to pregnancy/childbirth.

- Even if H had been able to make an indirect discrimination claim, it would have failed. H was disadvantaged not by the "provision, criterion or practice" of his employer paying only the statutory rate of pay for those taking ShPL, but by the fact that only birth mothers were entitled to maternity pay. In any event, any disadvantage would be justified as being a proportionate means of achieving a legitimate aim – the special treatment of mothers in connection with pregnancy or childbirth.

Analysis/commentary: It is reported that A and H are both seeking permission to appeal to the Supreme Court. However, in the meantime, employers can continue to treat maternity pay and maternity leave as a special case.

If the cases do go to the Supreme Court, the question of whether there could be an indirect discrimination claim is likely to be revisited, given that the equal pay route is blocked by the exclusion for special treatment relating to pregnancy/childbirth.

The other issue likely to come under scrutiny in the Supreme Court is the Court of Appeal's view that birth mothers on maternity leave are (for health and safety reasons) in materially different circumstances to men on ShPL, for the whole of the period of leave, not just the two-week compulsory period.

European Court decides that employers must be required to record daily working time

Summary: The European Court of Justice (CJEU) has decided that the Working Time Directive requires Member States to impose obligations on employers to record daily working time (*CCOO*).

Key practice point: It is advisable for UK employers to ensure they have a system for recording the daily working time of all workers. Compliance with the record keeping requirements of the Working Time Regulations, which cover only the maximum working week and night working, may no longer be sufficient.

Facts: CCOO, a Spanish trade union, applied for a declaration that the employer was under an obligation to set up a system to record the actual daily hours worked by its employees, so that CCOO could check compliance with national legislation on working hours and overtime. Under Spanish law, employers only had to provide records of overtime hours worked. The Spanish courts referred the question to the CJEU.

Decision: The CJEU held that Member States must require employers to set up an "*objective, reliable and accessible*" system enabling the time worked each day by each worker to be measured.

The Court said that Member States are required to ensure that workers actually benefit from the rights under the European Working Time Directive (WTD) on maximum working hours and daily and weekly rest periods. An objective and reliable record of the number of hours worked each day and each week is essential to establish compliance. A national law that does not provide this does not guarantee the effectiveness of

the WTD rights, since it deprives employers, workers and the enforcement authorities of the ability to verify compliance.

Neither the employer nor the Spanish Government had identified the practical obstacles that might prevent employers from setting up such a system. Costs is not an answer, given that the recitals to the WTD make it clear that "*protection of the health and safety of workers cannot be subordinated to purely economic considerations*".

The Court held that it is for the Member States to define the specific arrangements for implementing such a system, having regard, as necessary, to the "*particular characteristics of each sector of activity*", and the size of the employer.

Analysis/commentary: Regulation 9 of the UK's Working Time Regulations requires employers to keep "*adequate records*" to show whether they comply with weekly and night work limits. Failure to comply is a criminal offence. However, Regulation 9 does not state that all hours of work must be recorded, nor does it apply to daily or weekly rest periods. The Health and Safety Executive's Operational Circular states that specific records are not required and that employers may be able to rely on other records (such as pay) to meet their Regulation 9 obligations. The Regulations/HSE guidance may now have to be amended.

The Court's decision is that employers must be required to set up a system for measuring "*time worked each day by each worker*". Although the Court says it is for Member States to "*define the specific arrangements*", there must be a danger that the decision could be taken to apply to records of daily working time for all workers, including those who opt-out of the 48 hour maximum working week.

Transfer of clients' investments to a new firm could be a transfer of undertaking under the Acquired Rights Directive

Summary: The CJEU held that there could be a transfer of an undertaking under the European Acquired Rights Directive (ARD) where a stock market intermediary ceased operations but gave its clients the option to transfer their managed assets to another named intermediary. Whether there was in fact a transfer of an undertaking was for the national court to decide (*Dodic v Banka Koper*).

Key practice point: The decision could potentially be relevant if a similar scenario were to arise in the UK. TUPE might apply, even in the absence of the transfer of either tangible assets or employees.

Facts: Banka Koper, a Slovenian Bank, decided to stop its investment activities. This meant that it could no longer act as a stock market intermediary and, under Slovenian law on the financial instruments market, had to transfer clients' accounts to another firm authorised to provide the same services. The Bank gave its clients the option to transfer their financial instruments and other managed assets to Alta Invest, and 91% of its clients did so. The transfer to Alta did not apply to the employees, the premises or other business assets. The Bank dismissed all the stockbrokers it employed. They were all offered other roles but one of them, D, declined the offer and challenged his dismissal in the Slovenian courts, claiming that the Bank had transferred its activities to Alta under the ARD. He asked for reinstatement with the Bank or Alta.

The Slovenian courts found that there had been no transfer of an undertaking. The CJEU was asked whether the ARD applied.

Decision: The CJEU held that the transfer of the clients' assets could constitute a transfer of part of an undertaking, if the business had retained its identity post-transfer (in other words, if there had been a

transfer of clients). That was a matter for the Slovenian court to determine. The Court mentioned three significant factors:

- As the Bank's economic activity was primarily based on intangible assets (clients' financial instruments; the maintenance of their accounts; other financial and ancillary services; and investment records), the transfer of those assets was clearly important in assessing whether there was an ARD transfer.

- The transfer had to be subject to clients' approval – the Bank could not require its clients to entrust the management of their investments to a firm chosen by it. Consequently, the fact that the clients could freely decide whether to transfer to Alta did not mean that there could not be an ARD transfer.

- The fact that, following the transfer, the Bank co-operated with Alta as a dependent stock exchange intermediary was irrelevant.

Analysis/commentary: The Court's finding that the clients' ability to exercise freedom of choice over the identity of the new intermediary did not preclude a transfer of an undertaking may be of particular interest when considering whether there has been a TUPE transfer of a business providing financial services in the UK. As 91% of clients had transferred, the Court did not mention fragmentation of transferees, but this might prevent a TUPE transfer, depending on the circumstances, if the economic entity does not retain its identity.

Employer may have acquired knowledge of disability from employee's comments at dismissal appeal hearing

Summary: The EAT allowed an appeal against an Employment Tribunal decision that an employee's dismissal was not disability-related discrimination because the employer did not know of the employee's disability when it dismissed her. Although the employer had not known of the disability at the time of the dismissal, it might have acquired that knowledge at the appeal hearing (*Baldeh v Churches Housing Association of Dudley & District Limited*).

Key practice point: A dismissal may be discriminatory even if the employer did not know of the employee's disability until the dismissal appeal hearing.

Facts: The claimant, B, a support worker, was dismissed by the Association on 17 June 2015, after a performance review at the end of her six-month probationary period. One of the reasons for her dismissal was her poor communication style with colleagues. She appealed against her dismissal and, at the appeal hearing on 13 July 2015, she mentioned that she suffered from depression and that this sometimes caused her to behave unusually. The appeal was unsuccessful and she brought a claim for "discrimination arising from a disability" under section 15 of the Equality Act 2010.

The Tribunal accepted that B's depression was a disability, but rejected her claim, finding that, at the time of the dismissal the Association did not know, and could not reasonably have been expected to know, that she had a disability. B could not therefore have a claim under section 15, as this requires the employer to have knowledge of the employee's disability.

In addition, the Association had other reasons, apart from her communication style, that justified her dismissal.

Decision: The EAT overturned the Tribunal's decision and sent the case back to a fresh tribunal to decide whether the rejection of B's appeal was discriminatory.

Although the Association did not know about B's disability at the time of the dismissal, they might have acquired actual or constructive knowledge of it before the rejection of her appeal. Their letter rejecting her appeal referred to the fact that she had provided information about her health at the appeal hearing. Even though B had made a claim only in respect of the dismissal, at a time when it was agreed that the Association had no knowledge of her disability, that did not prevent consideration of what happened at the appeal stage. The EAT said that the outcome of an appeal against a dismissal is "*integral to the overall decision to dismiss*".

The EAT also pointed out that the fact that there may have been other reasons for the dismissal was not an answer to the section 15 claim. An employee does not need to show that the "something arising in consequence" of their disability (in this case, B's communication style) was the sole or main cause of their dismissal for it to be considered discriminatory, only that it had a "material influence" on the decision to dismiss.

Analysis/commentary: This decision is a reminder of the wide scope of actual and imputed knowledge in disability discrimination cases. Employers must take reasonable steps, and have systems in place, to find out information about an employee's disability, and this applies throughout any disciplinary and dismissal process. If evidence of a potential disability emerges during the disciplinary process, it may be necessary to adjourn the hearing pending further investigation.

Horizon scanning

What key developments in employment should be on your radar?

31 October 2019	European Union (Withdrawal) Act 2018 expected to take full effect
9 December 2019	Extension of the SMCR to FCA solo-regulated firms
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees

6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

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

- **Employment status**: *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers)
- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee); *López Ribalda v Spain* (ECtHR: covert workplace surveillance)
- **Discrimination / equal pay**: *Chief Constable of Norfolk v Coffey* (Court of Appeal: perceived disability discrimination); *McNeil v HMRC* (Court of Appeal: establishing particular disadvantage to women in equal pay claims); *Gray v Mulberry Company (Design) Ltd* (Court of Appeal: philosophical belief); *X v Y* (Court of Appeal: iniquity exception to legal advice privilege)
- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Ibrahim v HCA International* (Court of Appeal: public interest)
- **Trade unions**: *Kostal v Dunckley* (Court of Appeal: inducements/by-passing of collective bargaining); *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)
- **Agency workers**: *Kocur v Angard Staffing Solutions* (Court of Appeal: parity of terms)
- **Working time**: *Flowers v East of England Ambulance Trust* (Court of Appeal: overtime and holiday pay)
- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).

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