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UK Employment Law Round-up

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In this issue we look at some of the key employment law developments that have been taking place over the past month. In particular, we take a look at a case which considered the meaning of "establishment" in the context of an employer's duty to collectively consult during a redundancy process; the second wave of gender pay gap reporting; a holiday pay case decided by the Court of Justice of the European Union; and a Court of Appeal age discrimination case concerning public sector pension schemes.

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IN THIS ISSUE

Application of collective consultation "establishment" test to an international shipping fleet

In the recent case of *Seahorse Maritime Ltd v. Nautilus International* the Court of Appeal considered the meaning of "establishment" in the context of an employer's duty to collectively consult during a redundancy process under Section 188 of the Trade Union and Labour Relations (Consolidated) Act 1992 (TULRCA) and also clarified the position on territorial scope of TULRCA.

The duty to collectively consult is triggered where a proposal exists "to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less".

Background

Seahorse Maritime Limited (Seahorse), a Guernsey incorporated company, employed a number of individuals to serve on any ship managed by a third party, Sealion Shipping Limited (Sealion). The contracts of employment between Seahorse and its employees did not allocate them to a particular ship. The employees were primarily stationed outside British territorial waters and normally stayed on the same ship for the duration of their four- to six-week roster.

In 2015, Sealion decided to take four ships from its fleet of 25 out of service, which meant Seahorse's employees were at risk of being made redundant. Seahorse dismissed more than 20 employees working in Sealion's fleet but did not collectively consult.

Nautilus, the trade union recognised by Seahorse, subsequently brought a claim in the ET arguing that the UK-domiciled employees of Seahorse were entitled to a protective award as Seahorse failed to collectively consult.

The Tribunal looked at two key issues:

- whether one ship or the whole fleet was considered to be an "establishment" for collective consultation purposes; and
- whether the court has jurisdiction to hear the case on the basis that the "establishment" and/or the employees did not have a sufficient connection with Great Britain.

ET and EAT judgment

The ET found that the ships of the fleet collectively were capable of being one establishment for the purposes of TULRCA. On the facts, it found each ship could not be said to be a separate part of Seahorse's undertaking. This was, in part, because the employees' contracts did not assign them to a particular ship and some employees had been able to move between ships.

The ET also held that the collective consultation obligations under TULRCA applied to the UK-domiciled employees who were working on the ships in question.

Seahorse appealed to the EAT, which upheld the ET's judgment. Seahorse then appealed to the Court of Appeal, which allowed the appeal.

Court of Appeal judgment

The Court of Appeal disagreed with the ET and the EAT. It decided that each ship was its own establishment. The reasons were that an establishment does not need to have any legal, economic, financial, administrative or technological autonomy to be regarded as an establishment. It also does not need to have a management capable of independently effecting collective redundancies. The court decided that each ship was a self-contained operating unit and a de facto separate establishment to which a workforce was assigned. The court also found that the employees were assigned to specific ships, most employees returned to the same ship for long periods of time and correspondence to the employees made reference to a particular ship, where it was known.

On the issue of territorial jurisdiction, the court found that the issue of whether there is a sufficient connection to Great Britain relates to the establishment in question as opposed to the individual employees. This is because the primary obligation is to consult with employee representatives, not with individuals.

Given that the only connection between the ships and Great Britain was that some of Seahorse's functions were

performed by an administrative agent based in Surrey, the court decided this was not a sufficient connection to Great Britain.

For these reasons, Seahorse's appeal succeeded and Nautilus' claim was dismissed.

Implications for employers

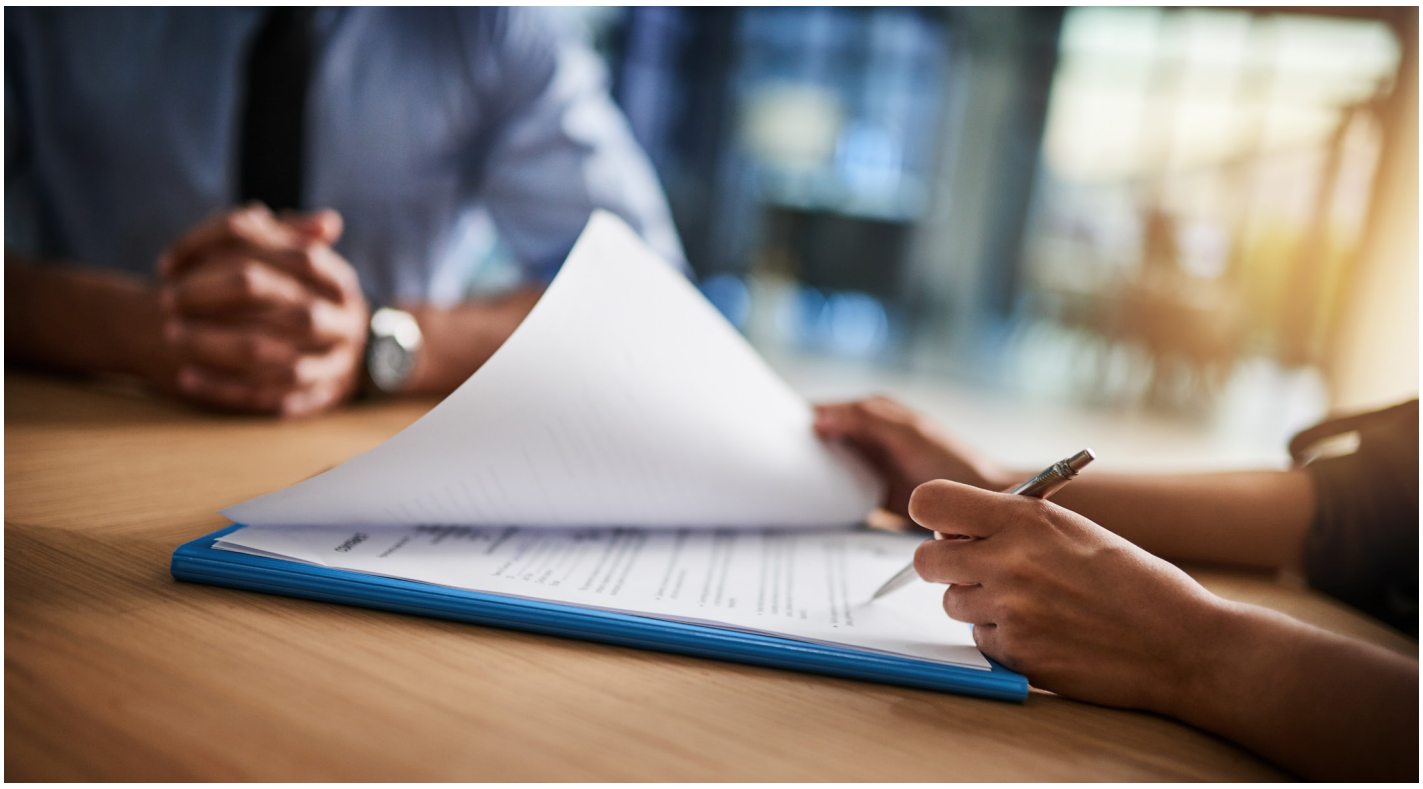
The "establishment" element of this case is a helpful reminder of the Woolworths case and the factors that must be considered when deciding whether a particular "unit" is an establishment for the purposes of TULRCA.

The territorial jurisdiction element is more interesting. Previous case law relating to employees who work outside of Great Britain has focused on rights under the Employment Rights Act 1996 and the Equality Act 2010 but this case provides clarification in respect of TULRCA. Instead of focusing on whether individual employees themselves have a sufficient connection with Great Britain, employers should focus on the establishment's connection with Great Britain.

Looking forward in 2019: gender pay gap reporting, the second wave

Gender pay gap reporting became mandatory for private employers with 250 employees or more as of 6 April 2017. As the second reporting date approaches (5 April 2019) we take a look at what some employers have done over the last 18 months in respect of their gender pay gap, as well as actions the Government and the Equality and Human Rights Commission (EHRC) have taken to encourage publication of results in the first instance, and recommendations on improving the gender pay gap going forward.

Employers had 12 months from 6 April 2017 to collate their relevant data ahead of the first annual reporting date, which was 4 April 2018. Employers were also required to publish their pay gap results on their website and the relevant Government website. As a refresher, the "gender pay gap" is a measure of the difference between men and women's average earnings across an organisation, expressed as a percentage of male earnings.



The race to reveal

It is fair to say there was no rush of employers looking to publish their gender pay gap data throughout 2017. So much so that in early November 2017 Theresa May called for more companies to report on their gender pay gap to address the inequality in the workplace. She said that "the gender pay gap isn't going to close on its own" and that "we all need to be taking sustained action to make sure we address this." The Prime Minister's announcement at that time came in the wake of a report, published by the World Economic Forum, which showed that the UK has dropped from a ranking of 9th in the world to 15th in respect of its gender pay gap (where the UK has remained as at December 2018).

The encouragement continued into early 2018 with Rebecca Hilsenrath, chief executive of the EHRC, stating: "Let me be very, very clear: failing to report is breaking the law. We have the powers to enforce against companies who are in breach of these regulations. We take this enormously seriously. We have been very clear that we will be coming after 100% of companies that do not comply."

Employers were reminded in the run-up to the 4 April 2018 deadline that companies which failed to make the deadline would be named and shamed on a public list on the Government portal. Companies which continued to avoid the requirement were told they might ultimately face a summary conviction, be subject to an unlimited fine and be forced to publish the data under a court order.

At the end of March 2018 only 50 per cent had revealed their figures on the Government Equalities website. Nevertheless, even the partial reporting up until that time exposed significant differences in gender pay across industries including finance, beauty and retail.

April 2018

More than 10,000 companies published their report by the deadline day. More than 1,100 companies published their report on the day of the deadline, which is more than the total number of companies who reported in the first 326 days of the scheme. Some argued that such late publishing was, in certain cases, a tactic to bury unflattering results in the last-minute flood of reporting.

From the data published by the deadline, we learned that 77 per cent of companies pay men more than women, 14 per cent pay women more than men and 8 per cent reported no gender pay gap at all. Perhaps unsurprisingly, the first year results showed men are paid more than women in every single industry sector, with construction representing the largest gap, followed by finance and insurance.

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Are the new disclosure rules on pay ratios sufficient to combat excessive pay disparity? http://www.ukemploymenthub.com/are-the-new-disclosure-rules-on-pay-ratios-sufficient-to-combat-excessive-pay-disparity
- Employers to be named and shamed for non-payment of Employment Tribunal awards http://www.ukemploymenthub.com/employers-to-be-named-and-shamed-for-non-payment-of-employment-tribunal-awards
- National minimum wage: BEIS launches consultation on salaried hours work and salary sacrifice schemes http://www.ukemploymenthub.com/national-minimum-wage-beis-launches-consultation-on-salaried-hours-work-and-salary-sacrifice-schemes
- Executive pay gap rules now in force http://www.ukemploymenthub.com/executive-pay-gap-rules-now-in-force
- Right to work checks- a modernised approach http://www.ukemploymenthub.com/right-to-work-checks-a-modernised-approached

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Why the gap?

In December 2018 the EHRC published a report entitled "Closing the Gender Pay Gap".

The concentration of men in senior roles was the main reason given for wide gender pay gaps (if employers gave a reason at all). The predominance of men in generally better paid industries such as finance, oil and gas, and IT is also a significant factor. Societal reasons such as the continued primary role of women as care givers to young children and older family members also has an impact.

Although there is no statutory requirement for an accompanying narrative explaining a gender pay gap, the EHRC describes this as "a valuable opportunity for employers to publicly set out the reasons for any gaps and also to explain what they intend to do through a time-bound and target-driven action plan". The EHRC's view (one of the key findings of the report) is that there are many benefits to explaining your pay gap including attracting and retaining talent, reputational and brand recognition, building trust and engagement with employees on action for solutions. Around 50 per cent of employers produced an accompanying narrative along with their results in 2018, but only some 11 per cent had set targets which would enable them to measure the progress of their plans year on year.

Executive pay

Under regulations which came into force on 1 January 2019, UK-listed companies with more than 250 UK employees must now publish certain executive pay data in their annual reports. The new regulations are part of the Government's efforts to improve transparency and accountability in corporate governance, and are a response to criticism that companies should justify executive salaries.

Quoted companies with more than 250 UK employees must provide the following in their directors' remuneration report:

- the ratio of their CEO's total remuneration to the median (50th), 25th and 75th percentile full-time equivalent remuneration of their UK employees; and

- supporting information, including the reasons for changes in ratios from year to year and, in the case of the median ratio, whether and, if so, how the company believes this ratio is consistent with the company's wider policies on employee pay, reward and progression.

Companies subject to the new regulations are also required to illustrate in the directors' remuneration report how the growth in the company's future share price impacts executive pay. In addition they must provide a summary of any discretion that has been exercised on executive remuneration outcomes reported that year in respect of share price appreciation or depreciation during the relevant performance periods.

The new requirements will apply for annual reports produced for financial years starting on or after 1 January 2019. The requirement for companies to illustrate the impact of share price increases will apply to all new remuneration policies introduced on or after 1 January 2019. Companies affected by the new regulations should ensure that they fully understand what is required of the new regulations, and should begin the process of identifying the data that will be needed to provide the information required by them. It will also be important to consider how the information will be explained and communicated by the business, both externally and to the workforce.

Action to consider

If your 2019 results show a lack of improvement or only a slight change to your organisation's gender pay gap, there are a number of steps for you to consider in order to reduce this gap going forward.

Identify the reasons behind your gender pay gap

There could be many reasons for a difference in average pay between men and women. For example, you may employ more men than women in high-paying or senior roles, or you may employ more women than men on part-time working arrangements. Whatever the reason(s) behind your gender pay gap, it is important to understand each reason fully in order to action change. Whilst the gender pay gap and equal pay are separate issues, unequal pay can influence the gender pay gap and should be addressed. An equal pay audit is often a good way to uncover and remedy issues. The EHRC commented in its 2018 report that it was "surprised" by how few employers mentioned equal pay audits in their gender pay gap reporting, given that many claimed that they had no issues with equal pay.

Implement policies which enable change

The solution is not as simple as increasing pay for women in certain roles and seeing your statistics change overnight. Although pay may be something to review across the organisation, there are policies that could create an environment where men and women have an equal opportunity to progress.

For example, if you have identified that there are more men employed at senior levels in your business, you should explore the reasons behind this. Review your internal workplace attitudes: are women discouraged from applying for senior positions due to internal attitudes or the required working style? If so, can you change this? It would also be worth reviewing your historical data regarding the application and interview process for these roles: do women apply for senior positions but not get the role, or do you have very few women applying for these positions at all?

Policies which may instigate change in these areas include transparency as to job requirements at every level, internal succession planning and developing talent from within, implementing an internal mentoring system and ensuring you have positive role models for both sexes at every level.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- People Management - Verity Buckingham analyses the likely effect of the new proposals to improve the UK's apprenticeship system.
- Scottish Grocer - Mark Hamilton reports on a recent employment tribunal case concerning workplace banter.

If you have an idea of a topic you'd like us to cover in a future round-up or seminar, please provide your comments here.

If you have identified that one of the reasons behind your organisation's gender pay gap is that more women are employed on part-time working arrangements than men, it may be an apt time to consider implementing policies and job descriptions encouraging flexible work. This disparity is often because there are few senior roles available for those who wish to work part-time. You may wish to consider whether you could emphasise that more senior roles can be carried out on a flexible basis too. A commitment to flexible working must become cultural and not be seen as a "tick-box" exercise.

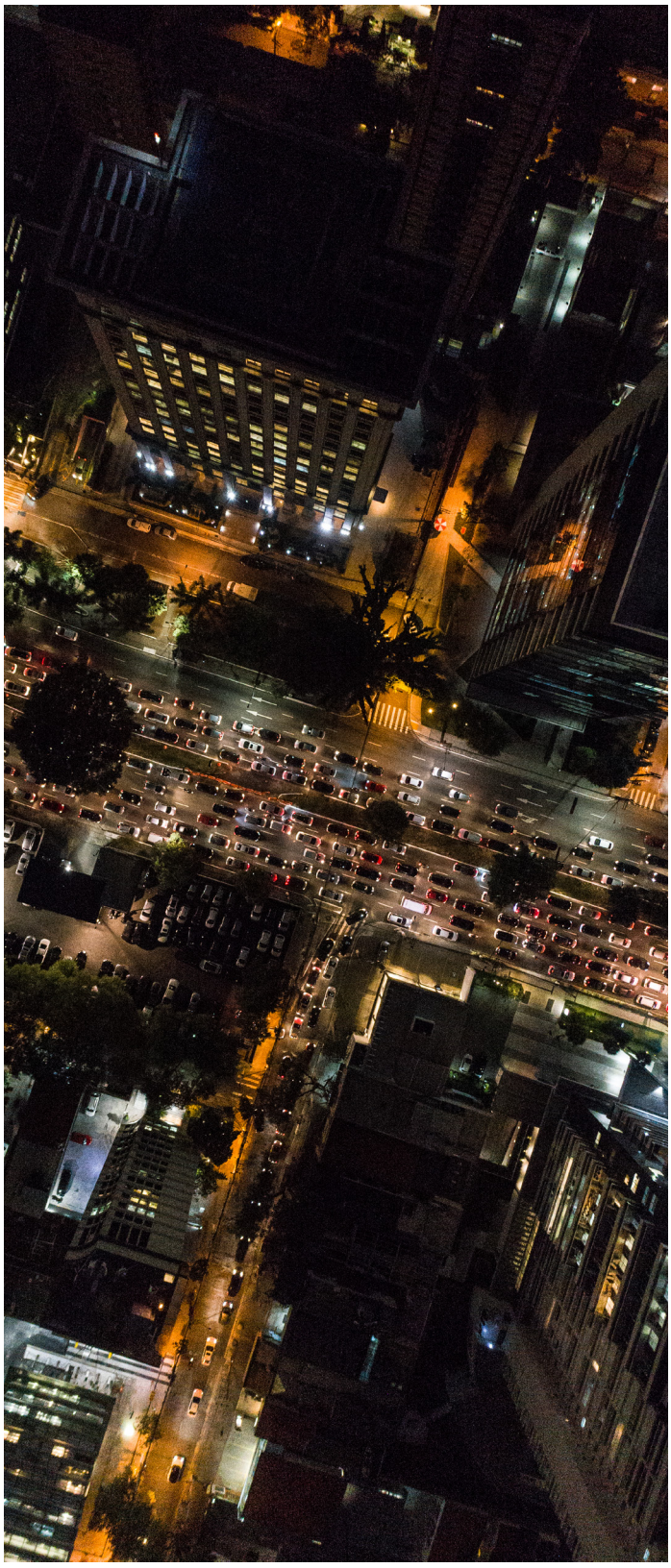
The EHRC recommends actively promoting shared parental leave to staff and considering an enhancement to the statutory minimum paternity leave, using other jurisdictions as an example of higher take-up among men.

Review your recruitment process
If one of the reasons for your gender pay gap is the higher ratio of male to female employees at your business, it may be a good time to review your recruitment policy and collect data surrounding your interview and offer statistics. Do you attract, and invite to interview, an equal number of male and female candidates for every role? Do you have transparent internal recruitment processes, gender-balanced interview panels, anonymous CVs/application forms?

You should seek to remove bias from any hiring, or promotion, process and decisions regarding who to interview, who to make offers to, who to promote and who to award bonuses to should be made as objectively as possible.

The 2018 EHRC report gave details of a transport sector employer who targeted a broader range of recruitment events and partnered with an industry women's association in order to encourage more women to apply for roles where they were underrepresented. The report also recommends a wider consideration of apprenticeships, not just in the stereotypical male roles within the construction and engineering industry.

Whatever the reasons behind your gender pay gap, all organisations should make a concerted effort to understand why their gap exists and how it can be closed, and then take steps to close it.



EU clarification: worker minimum holiday pay cannot be reduced to reflect short-time working

Most of the case law surrounding the calculation of statutory holiday pay is concerned with what elements of pay are to be included. Hein v. Albert Holzkamm, however, also addressed the question of what period should form the basis of the calculation of normal pay.

Background

Mr Hein was employed by Holzkamm as a concrete worker. In 2015, Mr Hein was working short-time and did not perform any actual work for 26 weeks. However, as would be the case in the UK, the employment relationship continued throughout this period.

During the course of his employment, Mr Hein was under a collective agreement with Holzkamm, which provided that holiday pay would be paid on the basis of a 13-week average calculation, in accordance with a long-standing provision of national law in Germany. When he took his holiday (including the four weeks required under the Working Time Directive) Mr Hein's holiday pay was therefore calculated on the basis of average pay over the period of short-time working, so excluding overtime for example, meaning that it was lower than his normal pay while working.

Holzkamm's reason for using average pay in its calculation was that German law, although requiring the calculation of holiday pay to be based on normal pay in line with recent European cases, allowed for the possibility of derogation by a collective agreement.

CJEU decision

The Court of Justice of the European Union (CJEU) held that this breached EU law in respect of the four weeks' paid holiday guaranteed by Article 7(1) of the Working Time Directive. It held that a guaranteed four weeks' paid leave was necessary for health and safety purposes and enabled workers to take their holiday entitlement without losing out financially. The CJEU concluded that German legislation, in allowing for collective agreements to take into account reductions in earnings due to short-time working for calculating holiday pay, was incompatible with EU law.

However, the CJEU also highlighted that the right to accrue annual leave arises from actual work. The object of allowing a worker to rest assumes that the worker has engaged in work from which they should be given a rest in order to protect their health and safety. Accordingly, annual leave would not accrue under the Directive during periods when no work was carried out. Instead, the CJEU directed that holidays under the Directive should be calculated by reference to periods of actual work completed under the employment contract. So, after 26 weeks of not performing any actual work, Mr Hein would only accrue two weeks' holiday under the Directive.

The CJEU emphasised that this does not prevent member states from applying more favourable provisions under national legislation for the benefit of workers, so long as member states do not breach minimum health and safety requirements in relation to the organisation of workers' working time. Therefore, holidays under the UK Working Time Regulations will continue to be based on the period of employment, not on how much of that period the employee was actually working.

The CJEU went on to briefly consider overtime as part of its judgment. It, unsurprisingly, concluded that pay for the four weeks' annual leave provided for under the Working Time Directive should not be lower than the normal pay received by the worker during periods of actual work. Therefore, the Working Time Directive precluded national legislation from allowing collective agreements to provide that reduced earnings (for example, because of short-time working during the reference period) could be taken into account when calculating holiday pay.

The CJEU highlighted that, if overtime is exceptional and unforeseeable, the resulting overtime pay does not form part of "normal remuneration" for holiday pay purposes – which is consistent with the now largely accepted position in the UK. However, the CJEU contrasted this with compulsory overtime (where "obligations arising from the employment contract require the worker to work overtime") where overtime pay would be part of normal pay.

Although it is not clear from the decision that such a sharp distinction was intended, it could mean that one of the conditions that has to be satisfied before overtime pay must be taken into account is that the worker's contract requires them to work overtime. This distinction

could lead some to seek to re-open the question of whether voluntary overtime should count as normal pay for these purposes.

It appears that a case dealing with this point, Flowers v. East of England Ambulance Trust, has been appealed and will be heard by the Court of Appeal this year. We will provide further updates on this point in due course.

Implications for employers

Holiday pay calculations can be tricky enough for employers, even without the added complications of considering irregular hours, shift patterns and seasonal variations in the demand for work. The Government has recently indicated that the reference period for the calculation of holiday pay may be increased to 12 months following the recommendations resulting from the Taylor Review.

However, the clearest message coming from this case is that, while there is a lot of flexibility at a national level to govern how much holiday a worker can accrue and how much they will be paid for that holiday:

- holiday pay must be based on normal pay earned when actually working; and
- some long absences may stop the accrual of holiday under the Directive, but beware discrimination arguments and accrual under national law.

This decision does not immediately change the position on holiday pay in the UK. When in doubt in calculating holiday pay, employers should make every effort to seek clarification to ensure that they are compliant with national and European legislation, since a failure to comply could be costly.

Pension reform and age discrimination

The Court of Appeal found that the transitional provisions in two public sector pensions schemes, designed to protect older workers, unlawfully discriminated against younger workers on the grounds of age. The Lord Chancellor and Ministry of Justice and another v McCloud and Mostyn and others; The Secretary of State and others v Sargeant and others (20 December 2018).

in these cases (which were conjoined) the Westminster Government lost its argument that the difference in treatment was justified. It would be surprising if the Government did not appeal at least some of the Court's decisions to the UK Supreme Court, given the cost of not doing so.

Background

Subject to any such appeal, these combined decisions find transitional protections in the judges' and firefighters' pension schemes unlawful.

The judges were members of the Judicial Pension Scheme ('JPS') until it closed on 31 March 2015. After that date, judges would accrue benefits in the New Judicial Pension Scheme ('NJPS'). It was not disputed that NJPS benefit accruals would be of considerably less value than membership of the JPS, both in terms of a reduced benefits and tax treatment. Transitional provisions were put in place, offering full, tapered or transitional protection depending on age. Judges born before 1957 were afforded full protection (remained entitled to membership of the JPS), judges born between 1957 and 1960 were given tapered protection and those born after 1960 were given no protection. A group of judges claimed they were directly discriminated against on the grounds of age.

Similarly the firefighters were members of the Firefighters Pension Scheme ('FPS') until 31 March 2015, and after that date would accrue benefits in the New Firefighters Pension Scheme ('NFPS'). As with the NJPS, the terms of the NFPS were materially less favourable than the FPS. Similar full, tapered, transitional or no protection was offered, depending on the age of the firefighters, with a view to protecting those closest to retirement age. A group of firefighters claimed they were directly discriminated against on the grounds of age.

Both groups also claimed equal pay and indirect race discrimination. In particular, in the judicial system, female judges and ethnically diverse judges tend to be younger, and so claimed that they were more likely to be affected by these changes.

Age discrimination

The Equality Act defines unlawful discrimination as treating one person less favourably than another because of a protected characteristic. Differences of treatment on grounds of age will not constitute discrimination if the discriminator can objectively justify it; as being an appropriate means of achieving that legitimate aim, and reasonably necessary to accomplish it.

In both cases it was conceded that the younger workers had been directly discriminated against by reason of age but it was asserted that this was justified as a proportionate means of achieving a legitimate aim.

The judges case

The Government had argued that for the judges the stated aim was to protect those closest to retirement from the financial effects of pension reform or, put another way, a 'moral and political' aim of being fair to those closest to retirement who would have less time to prepare for the impact of pension reform than those further away from retirement.

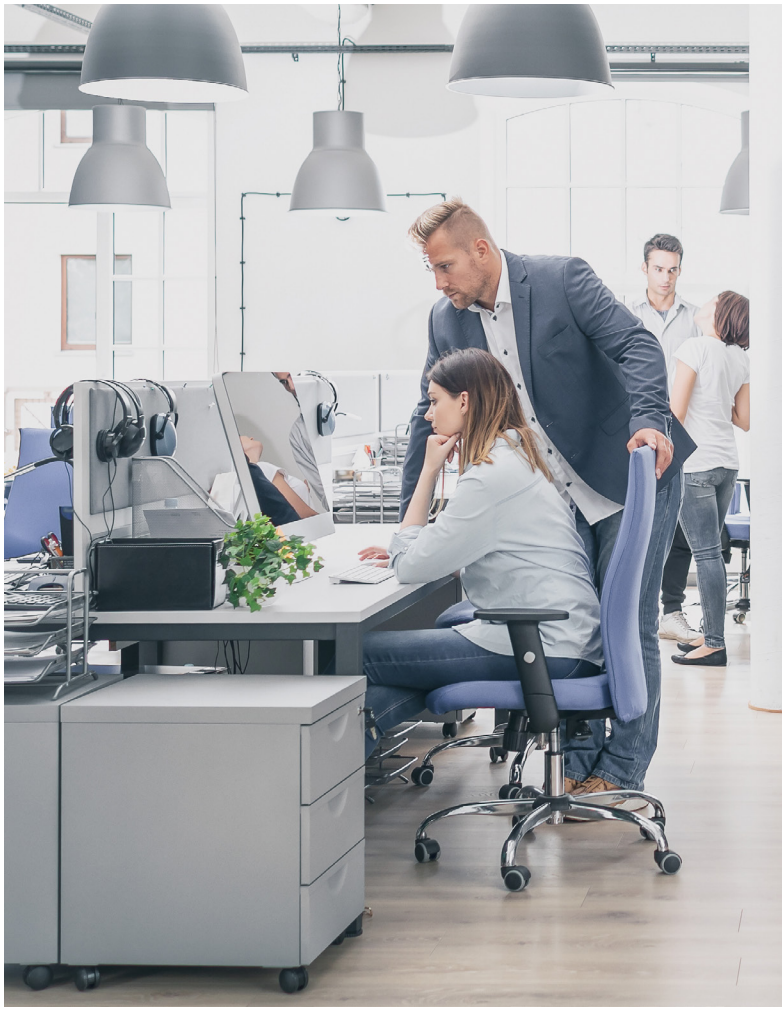
The Court of Appeal had agreed with the Employment Tribunal's judgement that the real reason the Government had incorporated transitional provisions was a desire for consistency: similar provisions had been agreed with trade unions for other public sector workforces. However, consistency requires like cases to be treated alike and, in the case of the judges, the position was different as, the older the judges were, the less adversely they were affected by the reforms. There was no rational explanation put forward to justify consciously treating a group, who were the least adversely affected, more favourably. Had there been a legitimate aim, it would be necessary to go on to consider proportionality. The Court of Appeal found that the transitional provisions went beyond what was necessary either to achieve consistency or to protect those closest to retirement. It stated that the desire to protect older judges was "irrational" and that there was an absence of evidence supporting this aim. It therefore follows that there was no basis on which this aim could be found to be legitimate.

The firefighters case

In the case of the firefighters the Employment Tribunal ('ET') found that the full protection provisions were lawful because they were in pursuit of legitimate aims and were using proportionate means. These aims were identified as:

- to protect those closest to pension age from the effects of pension reform;
- to take account of the greater legitimate expectation of those closer to retirement that their pension entitlements would not change significantly before retirement;
- to have a tapering arrangement so as to prevent a cliff edge between fully protected and unprotected groups; and
- to achieve consistency across the public sector.

It also found that the transitional provisions were both legitimate and proportionate as a line had to be drawn somewhere and that was a social policy choice. The firefighters appealed to the Employment Appeal Tribunal ('EAT'). The EAT upheld the ET's decision on legitimate aims but held it had erred in law in assessing proportionality. Both sides appealed to the Court of Appeal.



The Court of Appeal recognised that where the decision giving rise to the alleged discrimination is made by a Government, a tribunal must accord an appropriate margin of discretion to the state, however, it still has to ask whether the aim is legitimate in the particular circumstances of the employment concerned. That is an objective assessment which the ET judge had failed to carry out, in part because there was no evidence led as to the reasons underlying the aims. It therefore allowed the firefighters appeal and upheld their claims that they had been the victims of unlawful discrimination as this was the only conclusion that could be reached in the absence of evidence of legitimacy. Having done so there was no need to consider proportionality.

Comment

These particular pension reforms were the result of the Government's implementation of the 2011 Hutton Report recommendations. There will be a raft of public sector and quasi public sector schemes affected by this decision, as well as the pension provisions of some public sector service providers. Subject to the outcome of any appeal to the Supreme Court, this is going to be an expensive problem to resolve. Questions arise over younger workers who have suffered discrimination may be entitled to compensation:

- What changes must now be made to pension schemes to ensure compliance?
- Might there be actionable liability if employers were required to provide such pension provisions in public sector contracts?

The principles the Court applied here also apply to private sector schemes, so employers should carefully consider whether any compensatory or transitional provisions in a pension review exercise might be unlawful discrimination, not only on the grounds of age, but indirectly on the grounds of sex or race - or give rise to issues of equal pay.

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Contacts

Virginia Allen
Head of People, Reward and Mobility UK
D +44 20 7246 7659
virginia.allen@dentons.com

Sarah Beeby
Partner
D +44 20 7320 4096
sarah.beeby@dentons.com

Ryan Carthew
Partner
D +44 20 7320 6132
ryan.carthew@dentons.com

Mark Hamilton
Partner
D +44 14 1271 5721
mark.hamilton@dentons.com

Jessica Pattinson
Head of Immigration
+44 20 7246 7518
jessica.pattinson@dentons.com