WRIGLEYS
SOLICITORS

APRIL 2015

# Employment Law BULLETIN

## Welcome to our April employment law bulletin.

The last employment related legislation of the now dissolved coalition government received royal assent on 26th March 2015. We describe the main provisions of the Small Business, Enterprise and Employment Act, the Deregulation Act and the Modern Slavery Act.

In *Easton v B&Q plc* the High Court turned down an employee's claim for damages for psychiatric illness caused by occupational stress. On the facts of the case it was not reasonably foreseeable that the employee concerned would suffer a psychiatric illness as a result of work place pressures. In *Anakaa v Firstsource Solutions Limited* the Northern Ireland Court of Appeal has interpreted the meaning of 'in writing' for the purposes of the employer's duty to provide written itemised pay statements.

In *Secretary of State for Business Innovation and Skills v Dobrucki* the EAT has examined which liabilities of an insolvent transferor transfer to a transferee following a TUPE transfer.

Can a warning to an employee given in bad faith be relied upon by an employer in disciplinary proceedings? No said the Court of Appeal in *Way v Spectrum Property Care Limited*. A warning given in bad faith is not to be taken into account in deciding whether there is or was a sufficient reason for dismissing an employee. It would not be in accordance with equity or the substantial merits of the case to do so.

In *Chesterton Global Limited (t/a Chestertons) and another v Nurmohamed* the EAT examines the requirement in the Employment Rights Act that, for an employee disclosure to be protected under the whistleblowing provisions of the Act, the disclosure must, in the reasonable belief of the employee, be in the public interest. On the facts of the case an employee's disclosure about a company's alleged manipulation of its accounts, affecting 100 senior managers, amounted to a disclosure in the public interest.

Our client briefing this month is on the subject of TUPE transfers.

**May I also remind you of our forthcoming events:**

Click any event title for further details.

**Employment Law Update for Charities**

• Full Day Annual Conference, 11th June 2015

And in conjunction with ACAS

**Understanding TUPE: A practical guide to business transfers and outsourcing**

• Full Day Conference, **Cardiff**, 14th May 2015

**Understanding TUPE: A practical guide to business transfers and outsourcing**

• Full Day Conference, **Leeds**, 2nd June 2015

Dr John McMullen, EDITOR **john.mcmullen@wrigleys.co.uk**

## Contents



Wherever you see the BAILII logo simply click on it to view more detail about a case

## 1: New legislation

The Small Business, Enterprise and Employment Act, Deregulation Act and Modern Slavery Act all received royal assent on 26th March 2015.

The main employment provision of interest in the Small Business, Enterprise and Employment Act is the ban on exclusivity clauses in zero contract hours. There has not yet been a commencement order made for this, so it is not yet in force. One of the provisions which did come into force was the power to make regulations in relation to applications for postponement of tribunal hearings.

The Deregulation Act will introduce English Apprenticeships from 26th May 2015, setting out conditions to be met for an English Apprenticeship; abolish the wider recommendation power of tribunals from 1st October 2015; and deals with the health and safety duties on self-employed persons.

The Modern Slavery Act consolidates and simplifies existing slavery and trafficking offences. It will be an offence to hold another person in slavery or servitude, or to require them to perform forced or compulsory labour. It provides protection for victims of abuse who are on an oversees domestic workers visa, and it grants victims of slavery and trafficking leave to remain in the UK for a minimum of 6 months as domestic workers with rights to change employer.

## 2: Was an employer liable for psychiatric illness caused by occupational stress?

Not on the facts of ***Easton v B&Q plc***, said the High Court.

The claimant was a manager of a supermarket. He was very successful. However, he became ill through occupational stress and alleged this was due to the negligence and/or breach of statutory duty on the part of B&Q. A significant plank of Mr Easton's case was the lack of risk assessment by the employer in relation to stress.

Mr Easton was away from work with depression for about five months and received medication and therapy. When he returned it was on a phased basis at a store nearer his home address which was less busy than the store he previously managed. In the end though, this did not work out, and he was re-certified as unfit for work due to depression, and launched a claim

The trial judge relied upon the leading authority on claims by employees for damages in respect of psychiatric injury caused by stress in the workplace in *Hatton v Sutherland* [2002] ICR 613. The question in this case was whether the injury was reasonably foreseeable by the employer.

There is an excellent summary of the principles in *Hatton* at paragraph 50 of the decision. According to the trial judge an employer has no general obligation to make searching or intrusive enquiries and may take at face value what an employee tells him. In particular, an employee who returns to work after a period of sickness without qualification is usually implying that he believes himself to be fit to return to the work he was doing before. The foreseeability threshold in stress claims is therefore high.

On the facts of the case Mr Easton's claim failed at the first hurdle - foreseeability - in respect of his first breakdown. This was because of his long managerial career in charge of large retail

outlets with no psychiatric history. As to the relapse suffered by Mr Easton B&Q clearly now knew he had suffered a psychiatric illness. But the fact he was still taking medication was not determinative as to how his employment should have been handled. There are many people holding down demanding jobs who still require medication. On the facts, given the high standard of proof required, the relapse was also not foreseeable by the employer.

There remained the issue of the lack of a general risk assessment. But B&Q had a document about managing stress, inviting individuals to identify and notify the employer of any symptoms concerned. The trial Judge was of the opinion that Mr Easton had done insufficient to do this and therefore concluded that, on the facts of the particular case, a wider risk assessment would have had no effect on the outcome.

## 3: The meaning of written itemised pay statements

By virtue of section 8 of the Employment Rights Act 1996 an employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to the employee, an itemised pay statement "in writing". Nowadays, many employers ask employees to access on-line payslips. But does this comply with the law? Guidance has now been received from the Northern Ireland Court of Appeal in ***Anakaa v Firstsource Solutions Limited***. The NICA looked at the equivalent provision in Northern Ireland, which is Article 40 of the Employment Rights (NI) Order 1996.

In this case, the claimant, Julius Anakaa made a number of complaints regarding discrimination, non-payment of holiday pay, notice and bonus and, finally, that he was given no itemised payslip as required by the law.

The employer accepted that the employee was not given a written itemised pay statement but contended that, in keeping with what it suggested was modern industrial practice, employees were given on-line accessible payslips. The employer said they were accessible because it gave evidence that Mr Anakaa and other new employees were specifically trained as to how they could access their payslips online by means of a specific password system. And if employees forgot their passwords they could obtain a new password which would last for 24 hours and, at the same time, receive an email informing them how to create a new password. The Northern Ireland industrial tribunal at first instance was satisfied that this applied to everybody, including Mr Anakaa, although it appeared that, for some reason, Mr Anakaa had some difficulty in accessing his payslip, despite the training given to him.

The question of whether the employer had complied with the requirement to give a written itemised pay statement troubled the NICA. However counsel for the employer drew the NICA's attention to section 46(1) of the Interpretation (NI) Act 1954 (in Great Britain see the slightly differently worded, but similar definition in the Interpretation Act 1978, schedule 1) which provides:

> ""Writing", "written" or any term of like shall include words type written, printed, painted, engraved, lithography, photographed or represented or reproduced by any mode of representing or reproducing words in a visible form."

The NICA therefore accepted that, in the context of the current standards of information technology, the requirement to provide a written itemised pay statement is complied with if words are reproduced in a visible form on a computer screen. Because of the similarity of the wording in article 40 of the 1996 Order and schedule 1 of the Interpretation Act 1978, this view is persuasive on the legal position in Great Britain.

The NICA however added one caveat. If an employer is aware that an employee is having difficulty of any sort in actually accessing a payslip in this way the employer would be obliged to provide an alternative method providing information in accordance with the statutory requirement. This did not, in the opinion of the NICA, apply in the present case.

## 4: Can a warning given in bad faith be relied upon by an employer in disciplinary proceedings?

Readers of this Bulletin will be aware of the rule, in *General Dynamics Information Technology Limited v Carranza* (UKEAT/0107/14/KN), that, ordinarily, when deciding to dismiss, an employer is not obliged to reopen the merits of a final written warning on an employee's file unless the warning is shown to be manifestly inappropriate or given in bad faith.

In ***Way v Spectrum Property Care Limited***, the Court of Appeal considered a case where an employee alleged that a warning given to him was given in bad faith and should be discounted for the purposes of deciding whether he should be dismissed.

In December 2010 Mr Way was given a final written warning relating to what was said to be the inappropriate appointment of an individual by him in his capacity as recruitment manager contrary to Spectrum's laid down procedures regarding fair recruitment and the disclosure of any relationships.

Subsequently he sent a number of emails that were found to be inappropriate and in breach of the company's email and computer usage policy.

As the final written warning given to him in December 2010 was still live on his file this was relied upon by the employer in dismissing him for gross misconduct.

In proceedings before the employment tribunal Mr Way alleged that the final written warning, which was taken into account in deciding whether he should be dismissed, was given by his manager in bad faith.

The EAT rejected the employee's contention that the final written warning should be challenged, and further considered that, even if bad faith had been established, this would not have made any difference to the finding that Mr Way had been fairly dismissed. This was because the warning appeared valid on the face of it and was not challenged by the employee on appeal.

However the Court of Appeal overturned the EAT. It was not appropriate for an employer to rely upon a written warning which was given in bad faith. In the opinion of Lord Justice Christopher Clarke:

> "In my judgment a warning given in bad faith is not, in circumstances such as these, to be taken into account in deciding whether there is, or was, sufficient reason for dismissing an employee. An employer would not be acting reasonably in taking into account such a warning when deciding whether the employee's conduct was a sufficient reason for dismissing him; and it would not be in accordance with equity or the substantial merits of the case to do so."

The case was therefore remitted to a differently constituted employment tribunal in order to determine whether or not Mr Way was unfairly dismissed. For that purpose it would be necessary for the tribunal now to decide whether the warning was given in bad faith.

## 5: TUPE and insolvency

Liabilities towards employees when an insolvent transferor transfers its business is a complex question.

In broad terms, TUPE will only apply where the transferring employer is the subject of insolvency proceedings which have not been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner (TUPE Reg 8(7)). Thus, TUPE will not apply where the transferor is in compulsory or creditor's voluntary liquidation. But TUPE will apply where the transferor has gone into administration (see *OTG Limited v Barke* [2011] ICR 781; *Key 2 Law (Surrey) LLP v De'Antiquis* [2012] BCC 375).

Where TUPE does apply because the transferor company has gone into administration, there is some relaxation of the liabilities transferring to a transferee under TUPE. Regulation 8(5) prevents the operation of TUPE to transfer liability for unpaid sums due to transferring employees provided that these sums are reimbursable by the Secretary of State. These sums are identified by the "relevant statutory schemes" in the Employment Rights Act 1996. They include, for example, unpaid wages and holiday pay (within the statutory limits).

In ***Secretary of State for Business Innovation and Skills v Dobrucki*** employees were transferred from a company in administration to a former 90% shareholder who purchased its business. Three days later the business folded. All employees claimed arrears of pay and holiday pay, three claimed for unpaid notice pay and one claimed a redundancy payment. An Employment Judge found there had been a TUPE transfer, and, that, because the transferor company had been in administration, the employees transferred. But he considered that Reg 8(5) applied and the employees' claims did not transfer to the transferee, and remained with the transferor and were therefore liable to be reimbursed by the Secretary of State as the transferor was insolvent.

However, said the EAT, this was wrong.

The non-transfer of unpaid debts to employees only applies where the relevant liability has arisen prior to the transfer. In *Pressure Coolers Limited v Molloy* (EAT/0272/10) employees had been dismissed by the transferee after the transfer and therefore, said the EAT in that case, the transferee was solely liable for the sums claimed by the employees.

This was exactly the position in *Dobrucki*. The employees were dismissed after the transfer from the insolvent employer. The transferee therefore had to pay.

In an interesting *obiter dictum* Langstaff J considered that there might be an argument that even when the employment continues by virtue of TUPE accrued holiday pay may be a crystallised debt due before the transfer. And this would be payable by the Secretary of State within the statutory limits if the transferor were insolvent. However the point was not argued and the Judge declined to give a definitive opinion on that point.

## 6: Unlawful deductions: time limits for retrospective claims

The decision of the EAT in *Bear Scotland Limited v Fulton* (EATS/0047/13) means that non-guaranteed overtime should be counted in for holiday pay entitlement under the Working Time Regulations.

This could potentially have led to large historical claims, given that, where there is a series of deductions, under section 23(3)(a) of the Employment Rights Act 1996, the three month period for making a claim only runs from the last in the series of the deductions. The EAT itself, for policy reasons, concluded that a gap of more then three months between two deductions or non-payments would break the series of deductions. Although this point was not appealed it was not impossible that it might arise in another appellate case. Therefore the government intervened by enacting the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322).

The effects of these Regulations is that as from 1st July 2015 it will only be possible to claim historical deductions where the relevant date of the deduction/non-payment was no later than two years before the presentation of the complaint. This is provided by a new section 23(4A) of the Employment Rights Act 1996. This two year restriction however only applies to claims of the kind mentioned in section 27(1)(a) of the Employment Rights Act 1996 i.e. any fee, bonus, commission, holiday pay or other emolument referable to the employee's employment. It does not apply to the deductions of the kind mentioned in section 27(1)(b)-(j), for example statutory sick pay, statutory maternity pay and other remuneration provisions of the Employment Rights Act 1996.

## 7: 'Public interest' in whistleblowing cases

By way of background, the requirement of 'public interest' was added into the whistleblowing legislation by the Enterprise and Regulatory Reform Act 2013 (via section 17 which adds this into the Employment Rights Act 1996 section 43B (1)). The aim of adding this was so that whistleblower protection, i.e. protection from detriment or dismissal on the making of a protected disclosure, does not apply to a worker who relies on breach of the worker's own contract of employment (which would not necessarily be a disclosure in the public interest).

The EAT has had the opportunity to consider the 'public interest' requirement in ***Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed***. Mr Nurmohamed was employed as a senior manager at Chestertons. Between August and October 2013, following changes to the company's commission structure, he made disclosures to the area director and the HR director on three occasions regarding alleged manipulation of the company"s accounts. He claimed this, in turn, impacted on his commission. This affected him and around 100 other senior managers. It also made the company appear more profitable, to the benefit of its shareholders. Mr Nurmohamed was then dismissed and he brought various claims against Chestertons.

An employment tribunal found that he had been automatically unfairly dismissed, and that Chestertons had subjected him to detriments on grounds that he had made protected disclosures.

The disclosure, said the tribunal, did not have to affect the public as a whole, as it was inevitable that only a section of the public would be directly affected by any given disclosure. The crux of the matter was whether Mr Nurmohamed had a reasonable belief that the disclosures were in the public interest.

Chestertons appealed, on the basis that 100 senior managers did not constitute 'public interest' as being an insufficient section of society and the tribunal itself must determine whether the disclosures were made in the 'public interest.'

The EAT upheld the employment tribunal's decision and agreed that the public interest test had been satisfied. It disagreed that the tribunal itself must determine whether the disclosures were made in the 'public interest' as this does not give true effect to the statutory provision. It determined that disclosure does not need to benefit the public as a whole, as all disclosures will only ever benefit a section of society. The test to be satisfied is whether the worker reasonably believed that the disclosure was in the public interest.

Ultimately, the tribunal had answered the correct question and it was not for them to determine objectively whether the disclosure itself is of 'real interest' to the public to satisfy the 'public interest' test. Finally, it was noted that it is important to protect whistle-blowers for a number of reasons, including internal control of risk; avoiding litigation; reputational damage and staff morale; and avoiding criminal liability.

## 8: Client Briefing: TUPE transfers

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

This client briefing explains when TUPE applies and sets out the different obligations an organisation involved in the transaction may owe under the legislation.

### What is TUPE?

TUPE is an acronym for the Transfer of Undertakings (Protection of Employment) Regulations 2006. Where TUPE applies, employees automatically transfer from one employer to another with their terms of employment and continuity of service intact.

### When does TUPE apply?

TUPE applies to a "relevant transfer". A relevant transfer can be where:

- A business or part of a business or organisation is sold;
- Work is outsourced from a client to a contractor;
- Outsourced services are transferred from the original contractor to another contractor;
- A client brings the outsourced services back in-house.

### Which rights are automatically transferred under TUPE?

- Employees transfer to the new employer on their existing terms of employment and with all related employment rights, powers, duties and liabilities. Old age, invalidity and survivors' benefits under occupational pension schemes are excluded.

- The new employer steps into the shoes of the transferring employer in relation to the transferred employees. Any acts or omissions committed by the transferring employer are treated as having been done by the new employer.
- Employees who object to the transfer do not automatically transfer to the new employer. Their contracts will instead terminate on the transfer date, unless they resign sooner.

**Changing terms of employment**

The physical feature must be part of the organisation's premises for the duty to arise. For example:

- Any changes to employees' terms of employment are void if the sole or principal reason for the change is the transfer itself, unless there is an economic, technical or organisational reason requiring changes in the workforce (ETO reason) for the change.
- However, it is possible to make changes to transferring employees' employment terms if the reason for the change is permitted by the terms of the contract.

**Protection against dismissal**

- Employees are entitled to enhanced protection against unfair dismissal. Any dismissal of an employee with the qualifying period of service is automatically unfair where the main reason for the dismissal is the transfer itself, unless there is an ETO reason for the dismissal.
- This enhanced protection also applies if:
  - An employee resigns in response to a serious breach of their contract; or
  - The new employer makes a substantial change in the employee's working conditions which is detrimental to them
- Employers can be ordered to reinstate, reengage or compensate the dismissed employee if their complaint is upheld by the employment tribunal.

**Obligations to inform and consult**

- Both parties involved in the transfer are obliged to inform and (if appropriate) consult recognised trade unions or elected employee representatives in relation to their own employees who may be affected by the transfer. If there are no existing representatives they must be elected by the affected employees for the purposes of consulting over the transfer.
- An individual employee has the right to bring a claim for breach of these requirements if an employer:
  - Fails to take any steps to invite employees to elect representatives; or
  - In the absence of election, fails to give information to the affected employees.
- Certain information (for example a reason for the transfer and when it is expected to take place) must be provided to the representatives long enough before the transfer to enable the transferring employer to consult with them about it. Although the duty to inform always arises, the duty to consult only arises where an employer envisages taking measures in relation to affected employees.

- Employers that use agency workers should provide certain information on their use, for example the:
  - number of agency workers the employer uses;
  - parts of the business in which agency workers operate; and
  - type of work agency workers carry out.
- Failing to comply with these obligations can expose both parties involved in the transfer to up to 13 weeks' uncapped pay per affected employee. A transferor and transferee are jointly and severally liable for a transferor's failure to comply with its information and consultation obligations.

**Employee liability information**

- The transferring employer must provide information (including for example, the disciplinary and grievance records of the transferring employees) to the new employer not less than 28 days before the transfer takes place.
- If the transferring employer fails to comply with this duty, the new employer can apply for compensation based on the losses suffered with a minimum award of £500 for each employee that the information was not provided for.

**Insolvent businesses**

- To help the rescue of failing businesses, some key TUPE employment protections are relaxed if the transferring employer is insolvent. But the extent of these modifications depends on the type of insolvency proceedings the transferring employer is involved in. For more detail, see our discussion of Secretary of *State for Business Innovation and Skills v Dobrucki*, earlier in this Bulletin.

**If you'd like to contact us please email** john.mcmullen@wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101 