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MARCH 2016

Employment Law BULLETIN

Welcome to our March employment law bulletin.

This month we note items of interest arising from the Spring Budget and from the usual round of employment changes effective from 6th April 2016.

In *Mohamud v WM Morrison Supermarkets plc* the Supreme Court overturned the prior decision of the Court of Appeal in this case and held that an employer was vicariously liable for the actions of its employee in an unprovoked attack on a customer.

In *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and Others* the EAT has decided that TUPE can apply when, on a re-tendering of a service, there was a split in functions, with the separated functions given to two new service providers.

In *Peninsula Business Services Ltd v Donaldson* the EAT held that there is no statutory obligation on an employer to continue childcare vouchers during maternity leave. Childcare vouchers provided under a salary sacrifice scheme should be regarded as part of an employee's remuneration. Therefore their suspension during maternity leave was lawful, since normal salary may be suspended during maternity leave.

In *Hills v Niksun Inc* the Court of Appeal examined the exercise by an employer of its discretion in settling the amount of commission payable to an employee. In *Braganza v BP Shipping Ltd and another*, the Supreme Court considered that where there are grounds to conclude that an employer's exercise of discretion was irrational the burden of proof shifts to the employer to show that its decision was reasonable. So too, in this case. In settling commission, the obligation on the employer was to prove that its decision was, ultimately, reasonable.

In *Metroline West Limited v Ajaj* the EAT overturned findings of wrongful and unfair dismissal, ruling that an employer who reasonably believed that an employee was lying about his symptoms was entitled to rely on gross misconduct. "Pulling a sickie", as it is often described, may involve an employee representing, falsely, that he is unable to attend work by reason of sickness. If that person is not sick then it is a fundamental breach of the duty of trust and confidence in the employer/employee relationship.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Discipline and Dismissal: New cases and latest developments

- Breakfast Seminar, 19th April 2016

Employment Law Update for Charities

- Our ftion with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing

- A full day conference, **Leeds**, 13th May 2016

Understanding TUPE: A practical guide to business transfers and outsourcing

- A full day conference, **Newcastle-upon-Tyne**, 9th June 2016

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Wherever you see this logo more detail is available on the BAILII website

1: Spring 2016 Budget - key points for employers

Employer National Insurance contributions on termination payments

The Government has announced that, from April 2018, employers will have to pay NI contributions on termination payments above £30,000 that are already subject to income tax. The first £30,000 of a termination payment will still be exempt from income tax and, as is currently the case, employees will not be liable to make NI contributions on any termination payment.

Consideration of the range of benefits which can be provided through salary sacrifice arrangements

The Chancellor expressed concern that the number of salary sacrifice arrangements being sent for clearance to HMRC has increased by over 30% since 2010. However, he stated that the Government intends that pension saving, childcare, and health-related benefits such as Cycle to Work which are provided through salary sacrifice schemes should continue to benefit from income tax and NI contributions relief. The budget announcement suggests that limits on the range of benefits which can be provided through such a scheme may be imposed in the future.

Off payroll working in the public sector

From April 2017, public sector bodies will be responsible for ensuring that the right tax is paid when engaging an “off payroll” worker by contracting with a limited company set up to provide the worker's personal service. The rules already provide that off payroll workers pay broadly the same tax as employees, but this new announcement places the burden on public sector employers to ensure compliance with those rules.

2: National Minimum Wage: forthcoming changes in April and October

The Prime Minister announced this month the new hourly rates for the National Minimum Wage which will come into force on 1 October 2016. They are as follows:

- Workers aged 21 to 24: £6.95 (an increase of 3.7%);
- Workers aged 18 to 20: £5.55 (an increase of 4.7%);
- Workers aged under 18 but above compulsory school age: £4.00 (an increase of 3.4%); and
- Apprentices: £3.40 (an increase of 3%).

These increases reflect in full the recommendations of the Low Pay Commission.

As previously announced, the new National Living Wage of £7.20 an hour for those aged 25 and over will come into force on 1 April 2016, and will remain at that rate until April 2017. The Government has confirmed that the National Minimum Wage and National Living Wage rates will, from April 2017 onwards, be uprated in parallel.

3: Changes to employment law from 6 April 2016

A number of changes will be implemented from 6th April 2016. These include:

- Employers who fail to pay employment tribunal awards or settlement payments under a COT3 agreement will be liable to pay a financial penalty (50% of the unpaid sum with a minimum of £500 and a maximum of £5,000) to the Secretary of State.
- New rules coming into force from 6 April 2016 will limit the parties in employment tribunal proceedings to two postponements each and set a deadline for postponements of seven days before the hearing.
- The maximum compensatory award for unfair dismissal is to rise from £78,335 to £78,962. The cap on a week's pay which is used to calculate statutory redundancy payments and the basic award for unfair dismissal, will increase from £475 to £479
- The NI contribution rebate for contracting out of the state second pension (S2P) will come to an end in April as a consequence of the introduction of the single-tier state pension and the withdrawal of S2P. For those employers whose pension schemes were contracted out, this will mean that employer NI contributions for each employee will increase by 3.4% of earnings within the affected range. Employee contributions will also increase by 1.4% of earnings within the affected range.

4: Employer was vicariously liable for an employee's attack on a customer

In ***Mohamud v WM Morrison Supermarkets plc***, the Supreme Court unanimously overturned the decision of the Court of Appeal in this case, ruling that an employer was vicariously liable for the actions of its employee in an unprovoked attack on a customer.

For an employer to be vicariously liable in tort for the actions of an employee, there must be a sufficiently “close connection” between what the employee was employed to do and the wrongful conduct.

Mr Khan worked at a Morrisons petrol station in Birmingham. In March 2008, Mr Mohamud (who was of Somali origin) entered the kiosk and asked if he could print off documents from his USB stick. Mr Khan responded with racist and abusive language. He followed Mr Mohamud to his car, punched him in the head, knocked him to the floor and subjected him to a serious attack, involving further punches and kicks. Mr Khan ignored the instructions of his supervisor who tried to stop the attack.

Both at first instance and in the Court of Appeal, it was decided that there was not a close enough connection between the actions of Mr Khan and what he was employed to do. The fact that Mr Khan was an employee, that the assault happened on the employer’s premises, and that he was required to interact with customers in the course of his duties was held not to be sufficient reason to find Morrisons vicariously liable.

The Supreme Court did not agree. In allowing the appeal, the court found that Mr Khan's conduct was within the “field of activities” assigned to him (attending to customers and responding to their enquiries). In his reasoning, Lord Toulson commented that he did not “consider that it is right to regard [Mr Khan] as having metaphorically taken off his uniform the moment he stepped from behind the counter”. He took into account that the attack was not a personal one, but one in connection with the employer's business (an order to stay away from the petrol station) and involved an abuse of Mr Khan's position as employee.

Employers should be aware that they may be found liable for losses resulting from the wrongful conduct of an employee, even when that conduct is clearly not sanctioned by the employer. This case suggests that vicarious liability may not be confined to cases where the employee is given duties involving a clear possibility of confrontation or placed in a situation where an outbreak of violence is likely (such as in the case of a nightclub 'bouncer').

5: TUPE and Service Provision Change: split of functions following a re-tendering

In recent decisions the Employment Appeal Tribunal has, notwithstanding the usual stricture by the courts that service provision change under regulation 3(1)(b) of TUPE must be given a plain and literal meaning, advanced a common sense interpretation of the wording concerned in order to achieve a fair result. Of particular interest here are the cases of *Duncan v Ottimo Property Services Limited* [2015] IRLR 806, *Jinks v London Borough of Havering* UKEAT/0157/14, *Inex Home Improvements Limited v Hodgkins* UKEAT/0329/14/JOJ and, finally, *Mustafa and Steen v (1) Trek Highways Services Limited (2) Amey Services Limited (3) Ringway Jacobs Limited* UKEAT/0063/15/BA, covered in recent bulletins.

In ***Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and Others*** the EAT (Simler J (President)) continued this approach. The issue in this case was whether there could be a service provision change when, on a re-tendering of a service, there was a split in functions, with the separated functions given to two new service providers.

Until 31st December 2002 Bolton Council had engaged Greater Manchester West Mental Health NHS Foundation Trust to carry out the provision of alcohol and drug dependency services itself through its Alcohol and Drugs Directorate (although it had also procured certain services through outside independent providers). All of the claimants in this case were employed within the Trust's Alcohol and Drugs Directorate.

In 2011 Bolton decided to remodel the service by way of a re-tendering exercise. The tendered services were spilt into five 'lots'. Recovery planning and case management formed lot one and delivery and other kinds of interventions identified by a recovery plan formed lots two to five. From the outset it was clear that lot one was independent of lots two to five, and a successful applicant for lot one would not be awarded a contract for the remaining lots. So, at the outset, it was intended there would be a division of the two functions. Life Line Project Limited was the successful tenderer in respect of lots two to five (the delivery of interventions). Arch Initiatives was the successful tenderer in respect of lot one, which was the case management function.

Arch disputed that there was a service provision change. However an employment tribunal accepted that there was a service provision change of the case management in lot one and that the employees working on case management represented an organised grouping of employees, the principal purpose of which was to carry out those activities on behalf of the client (Bolton) and the employees were also assigned to that organised grouping. More accurately the employment tribunal said there were two organised groupings of employees, the majority of claimants being in one group and a Mrs Aulton (a manager) as an organised grouping of one, both of which had the principal purpose of carrying out the case management activities for Bolton. As there was an SPC TUPE transfer and as Arch refused to take the employees on, the employees were automatically unfairly dismissed.

Arch appealed. It argued, first, that the employment judge had adopted too narrow an approach to the definition of activities and this led him to a wrong conclusion on whether the activities were fundamentally or essentially the same. Second, it claimed, the employment judge erred in holding there could be a transfer of a part of a service or activity under the SPC provisions and, thirdly, the employment judge, Arch said, erred in law by concluding there were two organised groupings with the relevant principal purpose.

Simler J rejected these contentions. The service provision change regime was not to be construed as requiring that all of the activities carried out by the putative transferor before the relevant date cease and are carried out, instead, by a single putative transferee. 'Activities' is undefined and unqualified, and is not to be read as analogous or co-extensive with the word “service”. As Simler J said:

> “These are domestic provisions that do not depend on any finding that there was a discrete economic entity in the hands of a transferor with or without functional autonomy.”

The first question for an employment tribunal in every SPC case is whether the activities carried out by the outgoing person and which are, instead, carried out by the incoming person, are fundamentally the same. That is a question of fact for the employment tribunal. In Kimberley Group Housing Limited v Hambley [2008] IRLR 682 Langstaff J rejected the argument that regulation 3(1)(b) can only apply where there is one transferee to whom the activities transfer. In Kimberley the division of activities involved a quantitative split (with a proportion of properties that the original service provider was looking after henceforth split between two new providers). But according to Simler J there was no reason why the SPC provisions should not, in principle, apply in a case involving a division on functional lines. Thus:

> “The ways in which the activities of a service may be organised are incrementally variable. They may be organised geographically, in teams, in departments or by reference to particular functions or processes... Equally it is commonplace for contract awarding bodies to spilt a service into different components or functions when re-tendering, each of which is assigned to a different incoming contractor. Whether or not the SPC provisions in fact apply in any of these circumstances will depend on the application of the particular conditions within the SPC regime to the facts of the particular case.”

The next question of course is whether there was an organised grouping of employees whose principal purpose was the carrying out of those activities for the client. Again this is a question of fact and degree and there was no reason Simler J said, in principle, to limit the number of organised groupings of employees to one in any particular SPC case.

In short, said Simler J:

> “If…the SPC regime applies only where the whole of the activities carried out by the outgoing person are replicated in the hands of the incoming person, the range of situations in which the SPC provisions are capable of applying would be substantially restricted and it would be easy for the provisions to be circumvented so as to frustrate the purpose of the SPC regime.”

Simler J also thought this approach was consistent with the Department of Business Innovation and Skills guidance (although she noted that the guidance was non-binding and certainly not decisive in anyway as to the true meaning of TUPE).

Finally, Arch's criticism of the finding of the employment judge that the activities carried on after the SPC were fundamentally the same was rejected. Whether the services were fundamentally the same was a question of fact for the employment tribunal. The employment judge was entitled to make his findings on a broad assessment of the evidence and directed himself properly and was entitled to make the findings he did on that evidence.

6: Discrimination: suspension of childcare vouchers during maternity leave

In ***Peninsula Business Services Ltd v Donaldson*** a pregnant employee refused to enter into a childcare voucher salary sacrifice scheme because the employer's payments for vouchers would be suspended while she was on maternity leave leaving her only with statutory maternity pay. The terms of the salary sacrifice scheme also provided that no vouchers would be paid for during paternity leave, parental leave, and while on sick leave and receiving only statutory sick pay.

At first instance, an employment tribunal found that Ms Donaldson had been discriminated against on the ground of sex and because she had asserted a right to maternity leave. It also found that the provision of childcare vouchers under the scheme was a contractual benefit and as such it would be unlawful to deprive the employee of this benefit during maternity leave under Regulation 9 of the Maternity and Parental Leave Regulations 1999.

The EAT disagreed. In doing so, it made a distinction between vouchers which might be provided under a contract above and beyond normal remuneration and vouchers which were paid for by the employer after an employee had “sacrificed” an equivalent part of her salary. It found that in a salary sacrifice scheme, what is actually happening is that salary is being “diverted” from the employee's pay packet and that this amount is then used by the employer to pay for something on the employee's behalf.

On this analysis, the EAT decided that the childcare vouchers provided under the salary sacrifice scheme would be part of the employee's remuneration rather than being a contractual benefit on top of remuneration. “Terms and conditions about remuneration” are excluded from Regulation 9 of the Regulations and suspending the benefit of remuneration during maternity leave is therefore lawful (just as it is not discriminatory to suspend normal salary during maternity leave).

The EAT commented that the tax treatment of childcare vouchers as a “non-cash benefit” by HMRC was irrelevant to whether the vouchers are remuneration for the purposes of Regulation 9. It also noted that the real benefit of the salary sacrifice scheme is the reduction in tax paid by the employee and that this benefit in effect disappears when an employee moves onto statutory maternity pay.

Employers who provide childcare vouchers and other contractual benefits outside a salary sacrifice scheme should note that it would be unlawful to suspend the provision of these benefits during maternity leave. However, this case may be welcome news for employers who have been faced with the costs of continuing to pay for vouchers under a salary sacrifice scheme while an employee has no salary to sacrifice.

7: Guidance on ensuring advertisements do not discriminate

The Equality and Human Rights Commission has published a checklist which assists those who prepare job advertisements to avoid discriminating against potential applicants with protected characteristics.

Employers are advised to advertise widely to avoid the risk of excluding suitable people in particular groups and to include a prominent equal opportunities statement that applications are welcome from all suitably qualified or experienced people.

They should also avoid using images or job descriptions which imply that people with particular protected characteristics are not eligible for the role. For example, images of both men and women should be used to ensure that it is not implied that only one sex should apply. Employers should use

neutral descriptions of the skills being sought. The guidance suggests that words such as “young”, “mature” or “recent graduate” should be avoided as these could amount to age discrimination.

Advertisements should not specify physical characteristics, age, driving licence requirements or membership of a particular religion, unless it can be shown that these are a genuine requirement for the role and requiring them is a proportionate means of achieving a legitimate aim.

There may be some jobs for which an employer is seeking applicants with a particular protected characteristic. This can be lawful where there is a particular “occupational requirement” for the role. For example, an employer may advertise for women only where a care assistant is required to provide intimate care for a female service user. In such a case, the advert must clearly state the reasons for the occupational requirement.

The EHRC has also published more detailed guidance, along with answers to frequently asked questions. The checklist is available ***here***.

8: High Court was able to interfere with employer's discretion on commission payable

In ***Hills v Niksun Inc***, the Court of Appeal found that the High Court was entitled to increase the commission payable to an employee, notwithstanding the amount was stated to be at the discretion of the employer.

In *Braganza v BP Shipping Ltd and another* [2015] UKSC 17, the Supreme Court decided that when a party to a contract is exercising a contractual discretion it must avoid arriving at an unreasonable outcome and also ensure that the right facts have been taken into account in reaching the decision. So too in *Hills v Nicksun*, the Court of Appeal stated that where an employee has shown there are grounds to conclude that the employer's exercise of discretion in deciding the level of commission was irrational, the burden of proof shifts to the employer to show that its decision was reasonable.

Mr Hills was a UK-based regional sales manager for Niksun. Under his contract, his employer had “absolute discretion” to award him commission based on sales. A Commission Plan set out in detail the process the employer would follow when deciding on how much commission it was “fair and reasonable under the circumstances” to award, including considering the region from which the sale contract had been negotiated and managed. Mr Hills was successful in negotiating a sales deal with Credit Suisse London. The US arm of Niksun also had some part in the negotiations. Commission for this sale was awarded on the basis of 48% for Mr Hills and 52% for the US sales manager.

Mr Hills brought a breach of contract claim in the High Court, arguing that he should have been awarded 100% of the commission for the sale. Accepting the evidence of Mr Hills' manager rather than Mr Hills himself, the High Court found that it would have been reasonable for the commission to be split between the UK and the US managers but substituted a figure of two-thirds of the commission to be awarded to Mr Hills.

The Court of Appeal agreed. Referring to *Braganza*, it found that Mr Hills had succeeded in putting an arguable case that the commission decision had been irrational. It determined that the employer did not have a “broad and untrammelled” discretion to decide the level of commission as it was obliged to follow the Commission Plan in making its decisions, including the stipulation that the decided amount should be “fair and reasonable under the circumstances”. As the decision maker for Niksun was not called as a witness, the employer had failed to adduce evidence to prove that the decision was reasonable.

Both *Braganza* and the present case turn to some extent on their facts and are not broadly applicable. The exercise of employer discretion is not generally interfered with by the courts and

judges should not normally substitute their view for that of the employer. These cases are, however, examples of the courts appearing to be more willing than previously to step in to determine how an employer should have exercised its discretion. This case also highlights that employers should be prepared to bring evidence to prove that the basis for decisions on discretionary matters such as commission or bonuses was reasonable.

9: An employee who "pulls a sickie" may commit a fundamental breach of contract

In ***Metroline West Limited v Ajaj***, the EAT overturned findings of wrongful and unfair dismissal, ruling that an employer who reasonably believed that an employee was lying about his symptoms was entitled to find gross misconduct.

Mr Ajaj, a bus driver, reported that he had slipped at work and was injured. He was seen by his GP, a physiotherapist and occupational health and his absence from work was covered by a fit note. Metroline was concerned that Mr Ajaj's reported injury and symptoms were not genuine and arranged for covert surveillance. The claimant's descriptions of his ability to carry out normal day to day activities such as walking and shopping were contradicted by the video evidence.

Following a disciplinary hearing, Mr Ajaj was dismissed on the grounds of conduct. This decision was upheld on appeal. Mr Ajaj brought claims in the Employment Tribunal of wrongful and unfair dismissal.

At first instance, the employment judge found that Mr Ajaj had been wrongfully and unfairly dismissed. In making this decision, the judge found that the claimant had exaggerated his symptoms but the judge also considered whether the claimant was, on the evidence, capable of carrying out his role (sitting in one position for an extended period of time as would be required by a bus driver).

The EAT disagreed. It found that the employment judge was wrong to consider capability issues and should have focused on the misconduct of the claimant in lying about his condition and his ability to carry out normal day to day activities. The EAT found that the employer had a reasonable belief, based on a reasonably thorough investigation, that the employee had exaggerated his symptoms and misrepresented his ability.

The Hon Mrs Justice Simler commented that an employee who "pulls a sickie" is "representing that he is unable to attend work by reason of sickness". She stated that "if that person is not sick, that seems to me to amount to dishonesty and to a fundamental breach of the duty of trust and confidence that is at the heart of the employer/employee relationship".

While employers may welcome this judgment, it is advisable to remember that one view is that heavy-handed covert surveillance could amount to less favourable treatment in a disability discrimination claim. Employers should also be alert to the fact that, in capability dismissals, being fit for leisure activities is not always the same as being fit for the activities required at work.

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