WRIGLEYS
— SOLICITORS —

AUGUST 2014

Employment Law BULLETIN

Welcome to our August employment law bulletin.

This month we cover a number of interesting cases in the EAT. *London Borough of Southwark v Charles* and *Dominique v Toll Global Forwarding Ltd* both concern the pitfalls employers face in redundancy situations where there is a failure to make reasonable adjustments for a disabled employee involved in the process.

On the subject of TUPE, *Horizon Security Services Limited v (1) Ndeze (2) The PCS Group* and *Housing Maintenance Solutions Ltd v McAteer* concern, respectively, the exclusions and qualifications that may apply in service provision change TUPE transfers and the question of when, in law, a transfer actually takes place.

In the area of working time, *Truslove and another v Scottish Ambulance Service* concerns the difficult question of when an employee is considered to be working when on-call for the purposes of the Working Time Regulations.

Hershaw and others v Sheffield City Council illustrates the dangers for employers when promises are made informally by persons (such as HR consultants) who may have ostensible authority to bind the employer.

Our client briefing this month considers the rules on collective redundancy consultation.

May I also remind you of our forthcoming events:

Click any event title for further details.

The Diverse Organisation
- HR Workshop, 2th September 2014

Unfair Dismissal Case Law Update
- Breakfast Seminar, 7th October 2014

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. Employer had a duty to make reasonable adjustments for a disabled employee in the redeployment process

If an employer knows that the employee is disabled and is likely to be disadvantaged by a practice/criterion or practice (PCP), then, under the Equality Act 2010, the employer has a duty to make reasonable adjustments for that employee.

In *London Borough of Southwark v Charles* UKEAT/0008/14 the EAT held that a claimant had been put at a substantial disadvantage by being unable to attend redeployment interviews as a consequence of a known disability and that the employer had failed in its duty to make reasonable adjustments.

The claimant in this case, Mr Charles, was employed as an Environmental Enforcement Officer. He was informed that his role was redundant and was unsuccessful at interview for a role two grades below his own. He was therefore placed in the redeployment pool. Mr Charles was then diagnosed with sleep paralysis agitans and related depression and issued with a three month sick note. Following an occupational health assessment, the employer was informed that Mr Charles's condition constituted a disability and he was unable as a consequence of his condition to attend administrative meetings. The employer made a number of unsuccessful attempts to contact the claimant to determine whether he was interested in another role and to ask when he might be able to attend a redeployment interview. Mr Charles was dismissed on 26 August 2011 and subsequently brought claims in the employment tribunal for unfair dismissal and disability discrimination.

The tribunal found that the dismissal had been fair but that Southwark had failed to make reasonable adjustments to the redeployment process by waiving the need for the employee to attend for interview. The tribunal suggested that the employer could have interviewed the claimant in his home, sought information from the claimant without the need for an interview, or consulted his managers about his fitness for the role in question.

On appeal the EAT upheld the findings of the tribunal in that Southwark knew of the disability and made no adjustments to the process to attempt to deal with the disadvantage to the claimant. The EAT did, however, make it clear for the purposes of the remedies hearing that there was no guarantee that the claimant would have been appointed to the alternative role even if reasonable adjustments had been made.

This case lists some adjustments which might be considered reasonable for an employer to make for a disabled employee whose disability precludes their attendance at interviews and other administrative meetings. It should also be noted that the failure to be appointed to an alternative role will not automatically be taken to be the detriment or disadvantage the adjustments are designed to avoid. The employer in such a case may, for example, have consulted with the employee's managers in place of an interview and still decided not to appoint.

2: Employment contracts transfer by operation of law at the same time as a TUPE transfer takes place

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), a transfer takes place when an economic entity which retains its identity transfers, or when a there is a service provision change.

The House of Lords had previously held in Celtec v Astley and others [2006] UKHL 29 (following a reference to the ECJ) that any agreement as to employment made between the parties is irrelevant to the existence of an employment contract under TUPE. Contracts of employment will only transfer at the point when the transferee takes on responsibility for the transferor's business.

In the recent case of ***Housing Maintenance Solutions Ltd v McAteer and others***, the EAT reiterated the *Celtec* judgment.

This case concerned a contract for the repair and maintenance of housing association properties in Liverpool. The housing association terminated its contract with Kinetic on 9 June 2011. Kinetic's staff were informed that they were redundant and that their contracts had been terminated on 9 June. The housing association began the process of setting up a subsidiary company to provide it with repair and maintenance services (Housing Management Solutions Ltd (HMS)). HMS reassured Kinetic's employees that it would employ them but it did not begin service provision until 1 July 2011. A number of employees brought claims for unfair dismissal, unpaid wages during the interim period and failure to inform and consult under both TUPE and collective redundancy procedures. A key issue for the tribunal was the identity of the employer between 9 June and 1 July.

At first instance, the tribunal found that there was a TUPE transfer on 9 June 2011. It found HMS to be the employer from this date as HMS had "accepted responsibility" for the employees and engaged with the employees in "consultation and reassurance".

On appeal, the EAT found that the tribunal had erred in its finding that the transfer had taken place at the point where responsibility was assumed for the employees. The EAT followed *Celtec*, stating that the date of the transfer was the date when responsibility for the transferee's business (and not its employees) was transferred.

This case has made clear that the following factors are irrelevant when determining the date of a TUPE transfer: the intentions and beliefs of the parties as to the employment relationship; the date on which staff begin work; or the date on which business activities are resumed or continued. A transfer may take place before the transferee begins to carry out the transferred activities. Indeed, a transfer may take place at a point when no staff are working and when no activities are being carried out. The key question for the tribunal is: when did responsibility for the business transfer from one entity to another?

3: Duty of care when providing references

Employers have a contractual duty to their employees to take reasonable care when providing a reference. They also have a common law duty to the recipient of the reference to ensure that the information it contains is true, accurate and fair.

A recent case from the High Court serves as a reminder of this. In ***Playboy Club London Ltd and others v Banca Nazionale del Lavoro Spa***, it was held that a bank was liable for a casino's losses after providing an inaccurate bank reference for one of its customers.

The bank reference given to the casino stated that its customer was "trustworthy up to the extent of £1.6 million in any one week". Based on this reference, the casino allowed the customer to cash cheques at the casino. The cheques presented by the customer were subsequently discovered to be forgeries. The reference was found to be inaccurate: the customer had never had any funds in his account. It was also sent by a bank employee without the necessary express authority to prepare references.

The High Court found that the bank owed a duty of care to the casino even though the reference was given to a sister company. It held that the reference was a negligent misstatement. The bank was held to be liable on either of two grounds: its employee had ostensible authority to give the reference; or the employee had acted in the course of her employment. The provision of bank references was found to be a routine matter for bank employees and was closely connected with the work the employee in this case was authorised to do.

The casino was granted damages based on the difference between the casino's financial position if it had not allowed the customer to cash cheques and its position after cashing the cheques. The losses the customer suffered while gambling in the casino were not considered to be relevant to the calculation of damages. Damages were reduced by 15% due to the contributory negligence of the casino in its failure to carry out a careful examination of the cheques.

While this is not an employment case, it serves as a reminder of the need to take reasonable care when providing references to ensure that the information therein is accurate, true and fair. Employers who do not take such care may find they are liable for losses suffered as a consequence by an employee or by the recipient of a reference.

4: HR consultant's letter to employees could have contractual effect

In contract law, a contract may be unenforceable if it is made by a person without the authority to make it. However, where the person has actual or ostensible authority, that contract may bind the principal.

The case of ***Hershaw and others v Sheffield City Council*** concerned a claim for unlawful deductions from wages under section 13 of the Employment Rights Act 1996. The pay of a number of council employees was cut by the employer. The employees accepted the pay cut "under duress" and appealed against the decision. As the decision of the appeal panel was not communicated to the claimants, they raised a grievance.

Sheffield City Council (the Council) appointed a HR consultant who was working for them in their equal pay team to investigate the grievance. The consultant was authorised to communicate the outcome of the grievance to the claimants, but she did not have authority to make any decisions concerning the case. She wrote a letter to the claimants stating that the appeal panel had determined that they should be on pay grade 5 (two grades above their present grade).

The claimants' pay did not go up accordingly, however, and the Council realised that the letter contained a mistake: the appeal panel had in fact decided that the claimants should be on pay grade 4. The difference in pay between grade 4 and 5 was approximately £2,700. The claimants then brought a claim for unlawful deduction of wages.

At first instance, the tribunal determined that the letter did not have contractual effect as the consultant had neither actual nor ostensible authority to make a contract on behalf of the Council. The tribunal did not go on to consider whether the contract was void for mistake.

On appeal, the EAT ruled that the employment judge had erred in finding that the letter was not contractual. It found that the Council had held out the consultant as a person who could communicate an authoritative answer on a grievance which was solely about pay and that the letter was intended to state the Council's decision on what level of pay the claimants were to be offered. The consultant therefore had ostensible authority to make a contract. As the employment judge had made no decision on the issue of mistake, the case was remitted to a new tribunal.

Employers should be alert to the fact that a tribunal may find an enforceable contract if the person making the communication is deemed to have been held out as authorised to make the offer. The case also shows that where such a contract comprises an unconditional offer of increased pay, an employee will be deemed to have accepted the offer simply by continuing to work. There is no need for the employee to have accepted the offer expressly.

5: Public Bill Committee calls for written evidence in response to the Small Business, Enterprise and Employment Bill

The Small Business, Enterprise and Employment Bill has now reached the Public Bill Committee stage. Respondents have until around the middle of October to submit written evidence. The Bill proposes some key changes which will be relevant to employers. These include:

- Reforming whistleblowing procedures to achieve a consistent best practice standard for handling disclosures and greater reassurance to the whistle-blower that action is being taken by the prescribed person.
- Deterring non-payment of tribunal awards by employers by imposing tough financial consequences for non-payment.
- Reducing tribunal delays caused by postponements and addressing the costs arising from short notice postponements.
- Increasing the penalties imposed on employers who underpay their workers in breach of the national minimum wage legislation and calculating such penalties on a "per worker" basis.
- Rendering exclusivity clauses in zero hours contracts invalid and unenforceable so that no one is tied into a contract without any guarantee of paid work.
- Recovering exit payments from public sector employees who leave and re-join the same part of the public sector within a year.

6: Employer had a duty to make reasonable adjustments to prevent injury to the feelings of a disabled employee

In ***Dominique v Toll Global Forwarding Ltd*** the EAT found that an employer should have made reasonable adjustments to redundancy criteria even though the disabled employee would still have been dismissed had those adjustments been made.

Claims for indirect discrimination and discrimination arising from disability will fail if the employer can justify the treatment of the employee as a proportionate means of achieving a legitimate aim.

Employers have a duty to make reasonable adjustments where a provision, criterion or practice (PCP) places a disabled employee at a substantial disadvantage when compared with a non-disabled employee. The EHRC Employment Statutory Code of Practice lists matters which might be taken into account when considering what adjustments would be reasonable to make and gives the example of discounting disability-related absence when scoring an employee on their sickness record.

Mr Dominque had physical and cognitive impairments amounting to a disability resulting from a stroke a few years earlier. His disability gave rise to inaccuracies and low productivity. He was informed that he was in the pool selected for redundancy in January 2011. The redundancy pool was

scored by two sets of markers on the following criteria: length of service and absence, skill-set, productivity, accuracy, flexibility, and discretionary effort. Both sets of markers scored the claimant as the lowest in the pool. Mr Dominique was selected for redundancy and, despite going through the appeal process, was dismissed. The claimant brought claims for unfair dismissal and disability discrimination.

At first instance, the Employment Tribunal found no evidence of direct discrimination. It held that the productivity and accuracy criteria had disadvantaged the claimant, but that the employer was justified in using them as they were proportionate. The tribunal found no failure to make reasonable adjustments because the claimant would have been dismissed even if an adjustment (adding a percentage uplift to Mr Dominique's scores) had been made.

On appeal, the EAT considered the justification of the treatment / PCP, the duty to make reasonable adjustments and the interplay between these two elements.

The EAT stated that there is no legal requirement to consider the failure to make reasonable adjustments before considering justification. However where there is a link between the adjustments alleged to be required and the detriment to the employee, it suggested that any failure to comply with the duty to make reasonable adjustments should be taken into account when considering justification.

In its consideration of the duty to make reasonable adjustments, the EAT found that the tribunal had been wrong to consider the dismissal itself as the detriment or disadvantage which the adjustment could have overcome. Rather the claimant's experience of getting low scores in the procedure was the relevant detriment. Clearly, an uplift in his scores might have avoided this detriment.

In this case, there was a link between the required uplift to the scores and the detriment to the claimant: the claimant suffered injury to feelings because of his low scores. The EAT therefore remitted the case so that justification could be reconsidered, taking into account the failure to adjust the criteria. It suggested that an award in line with the lowest Vento band (£660 to £6,600) would be likely if the tribunal found that the treatment of the claimant could not be objectively justified.

Employers should consider making reasonable adjustments to redundancy criteria where disabled employees are concerned. This is the case even where an employee would have been dismissed regardless of the adjustment, as the tribunal may now consider injury to feelings to be the disadvantage the reasonable adjustment would have avoided.

7: On-call workers may be working even when not required to be at the workplace

Regulation 10 of the Working Time Regulations 1998 (WTR) states that a worker is entitled to 11 consecutive hours' rest in each 24 hour period. ECJ case law has examined the question of whether an on-call worker is resting or working. Under previous ECJ cases it was held that an on-call worker is working when he or she is obliged to be at a place specified by the employer. The Northern Ireland Court of Appeal case of *Blakley v South Eastern Health and Social Services Trust* [2009] NICA 62 determined that an on-call worker who had to be "contactable" at all times during his week on call, but who otherwise had no geographical restrictions placed upon him was only working when he was actually called out.

In ***Truslove and another v Scottish Ambulance Service*** the Scottish EAT considered whether two ambulance paramedics were working or resting during on-call periods. The claimants

occasionally worked on-call night cover shifts at remote ambulance stations. During these periods the claimants stayed at a place of their choice which had to be within a three mile radius of the station and they had a target of a three minute response time. This restriction meant that neither claimant could stay at their home address while on call.

At first instance, the tribunal applied the principles in *Blakley*, determining that the claimants' on-call time was not wholly working time because their location was not specified by the employer.

On appeal, the Scottish EAT substituted its own decision for that of the employment tribunal that the claimants were working for the purposes of the WTR while on call. It found that the tribunal had wrongly applied *Blakley* as the paramedics in this case had to be within an area specified by the employer, even though there was some freedom as to the exact location. It clarified that it is the lack of freedom which results from an employer specifying a geographical area or response time for an on-call worker which should be considered when deciding whether the worker is at work or at rest. There need not be one specified location. The tribunal should consider to what extent the worker's time is his or her own and how far he or she has relief from employment.

This case clarified that work and rest are mutually exclusive for the purposes of the WTR. Employers should note that an on-call worker may be considered to be working and not resting when the employer imposes significant restrictions upon the area within which the worker must stay during on-call periods or the time within which the worker must respond to a call. Workers whose freedom is considerably restricted in this way while on call may now find it easier to succeed with a claim for breach of the WTR.

8: TUPE: When service provision change does not apply

Horizon Security Services Limited v (1) Ndeze (2) The PCS Group provides two illustrations where a service provision change TUPE transfer may not apply.

In this case, PCS, a security contractor, had been engaged to provide security services for Workspace Plc which was looking after a business centre on a site owned by the London Borough of Waltham Forest. Then the site was taken back by the London Borough of Waltham Forest who engaged a new security company, Horizon, specifically to look after the site for a limited period of 8 to 9 months pending demolition of the building for the purposes of allowing a supermarket to be erected. Employees working for PCS claimed there was a service provision change and that they should be engaged by Horizon. But a fundamental rule in relation to service provision change is that the client for whom the services are provided must be the same. This rule derives from the Court of Appeal case of *Hunter v McCarrick* [2013] IRLR 26. Here, the client had changed. PSC was working for Workspace Plc and Horizon was working for London Borough of Waltham Forest which was a different legal entity. The service provision change rules did not apply and the employees were not entitled to transfer to Horizon.

The second point in the case is that service provision change TUPE transfers cannot occur where the client intends the contract to relate to a task of short term duration. The contract that had been given to Horizon was of limited duration simply to look after the site pending its demolition. This was therefore a task of short term duration and for this second reason there was no service provision change.

9: Client Briefing: Collective redundancy consultation

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 summarises the collective redundancy consultation process.

When does the duty to consult collectively arise?

- The duty to consult arises where a business is proposing to dismiss as redundant 20 or more employees within a period of 90 days or less, even if the employees are based at different locations within the business.
- The obligation to consult operates, in effect, as a moratorium on the proposed dismissals, whereby the dismissals cannot take effect for a minimum period of time once consultation has started.

Whom to inform and consult

- The business has a duty to inform and consult on its proposal with appropriate representatives of the affected employees. It must also notify the Department for Business, Innovation and Skills. Failure to do so is a criminal offence.
- Where any of the affected employees is a member of a recognised trade union, the trade union must be consulted. In other cases, the business may consult with representatives directly elected by the affected employees or with an appropriate standing body of representatives elected or appointed for some other purpose.
- Where elected representatives are required, specific statutory rules exist governing the election and adequacy of representation produced by that election.

The consultation process

- The consultation must begin in good time. Certain minimum time periods apply depending on the scale of the redundancies proposed. For fewer than 100 redundancies the consultation period is 30 days. For more than 100 it is 45 days.
- Consultation begins with the provision of information on the proposals to representatives.
- As a minimum, consultation must be undertaken with a view to reaching agreement on:
  - ways and means of avoiding the dismissals;
  - reducing the numbers of dismissals; and
  - mitigating the consequences of any dismissals.

Penalties for breaching the duty to consult

- A failure to comply with any of the rules on information or consultation, or on the election of representatives, can lead to a protective award being made by an employment tribunal.
- The maximum protective award is up to 90 days' gross pay for each affected employee. The award is not based on loss of earnings, but on the seriousness of the employer's default.

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