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Employment Law BULLETIN

Welcome to our January employment law bulletin.

Our bulletin this month includes a number of interesting cases.

In *EXOL Lubricants Ltd v Birch* the EAT considered whether, when employees lost the benefit of free parking near their homes, this was a place of work redundancy.

In *London Borough of Hillingdon v Gormanley* the EAT considered the correct test of whether an employee is assigned to a service changing hands under TUPE. The EAT reminds us that the CJEU decision in *Botzen v Rotterdamsche Droogdok Maatschappij BV* is the primary test in this area.

In another TUPE case, *The Rangers Football Club Limited v Professional Footballers Association Scotland and another,* which arose from the insolvency, and subsequent sale, of The Rangers Football Club, the EAT discussed the status of the Scottish Professional Footballers Association for the purposes of making a claim as an appropriate employee representative for failure to inform and consult under TUPE.

In *Millet v Tesco Stores Limited* the EAT approved an employment tribunal decision which dismissed an employee's claim for unfair dismissal on ground of performance where the employer had carried out a textbook procedure.

In *Bieber & Others v Teathers Ltd (in liquidation)* the High Court considered that, for the purposes of non-employment tribunal claims at least, an exchange of emails could constitute a settlement agreement unless the transaction had been made expressly "subject to contract".

This month's client briefing discusses the rules on settlement agreements generally.

Finally, may I also remind you of our forthcoming events:
Click any event title for further details.

TUPE in practice: 10 top tips to getting the process right
• Breakfast Seminar, 3rd February 2015

Interviewing and Selection Skills
• HR Workshop, 3rd March 2015

and in conjunction with ACAS in the North East:

Understanding TUPE: A practical guide to business transfers and outsourcing
• Full Day Conference, 11th February 2015

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

1. Government intervenes to introduce two year limitation period for retrospective holiday pay claims

As we discussed in our November Employment Law Bulletin, in *Bear Scotland Ltd & Others v Fulton & Others* UKEATS/0047/13, *Hertel (UK) Limited v Woods & Others* UKEAT/0160/14 and *AMEC Group Limited v Law & Others* UKEAT/0161/14 the EAT held that non guaranteed overtime must be taken into account in calculating holiday pay for the minimum four weeks statutory annual leave required by the Working Time Directive. However, to mitigate the effect of that ruling, the EAT held that there would be a break in the chain of any "series of deductions" for the purposes of an unlawful deduction from wages claim where a period of more than three months has elapsed between the deductions. This very effectively limits the scope for employees to make significant retrospective claims for underpaid holiday. However, in some cases, there is a remote possibility that there could be an unbroken series of deductions leading to a deeper claim for retrospective underpaid holiday pay.

This is now tackled by the Deductions from Wages (Limitation) Regulations 2014 (SI 2014/3322) which do two things. First, they introduce a two year "back-stop" period on most unlawful deductions from wages claims. Secondly, they provide that regulation 16(4) of the Working Time Regulations 1998 does not confer a contractual right to paid leave. This effectively stops holiday pay claims being brought in the civil courts as a breach of contract claim where, ordinarily, the limitation period is six years.

2: Cabinet Office Guidance on settlement agreements, special severance payments and confidentiality clauses

The Cabinet Office has published new guidance on the use of settlement agreements, special severance payments and confidentiality clauses on termination of employment in the public sector. The new rules apply from 1st February 2015.

The guidance applies to all civil service organisations and their arm's length bodies (ALBs) and covers cases in which public money is being spent on civil servants or non-civil servants employed by government departments or ALBs. ALBs include ministerial departments, non-ministerial departments, executive agencies, crown non-departmental bodies and non-departmental public bodies.

The guidance dictates that a settlement agreement should not be used in order to avoid taking appropriate performance/attendance management or disciplinary action; to cover up individual or organisational failure; to prevent an employee from speaking out, for example to cover up malpractice; or to terminate someone's employment because they have made a protected disclosure under the whistleblowing legislation.

A special severance payment is defined as a payment made to an employee beyond his or her statutory or contractual entitlement on termination of their employment. Quite rightly, special severance payments are expected to be "rare and exceptional". Any department considering making a special severance payment must take legal advice and be able to demonstrate that any payment is in the public interest and provides value for money. HM Treasury approval must be obtained in such cases.

Confidentiality clauses should not be used in settlement agreements as a matter of course. In particular they should not prevent the proper disclosure of matters of public interest such as wrongdoing in the work place. Departments should not automatically use confidentiality clauses, but consider whether they are required on the facts of the particular case and take legal advice on the use of the clause. If a confidentiality clause is used the employee must be expressly reminded of their rights under the Public Interest Disclosure Act 1998. Certain high visibility or high value settlement agreements that contain confidentiality clauses must be approved by the appropriate minister and the minister for the Cabinet Office. A link to the guidance maybe accessed ***here.***

3: House of Commons Library Note on Employment Tribunal Fees

The House of Commons Library provides impartial information and research services for members of parliament and their staff to support their parliamentary duties. These are published on the UK Parliament website. There have been a couple of House of Commons Library notes which may be of interest. One is on the current state of play on TUPE and pensions which may be accessed ***here.*** Another has been published on Employment Tribunal Fees. It summarises the background to the introduction of fees and their impact and their effect on the number of claims received by employment tribunals. The note may be accessed ***here.***

4: When employees lost the benefit of free parking near their homes, was this a place of work redundancy?

No, said the EAT in ***EXOL Lubricants Ltd v Birch.***

In this case the claimants were employed as delivery drivers using HGVs. They lived in Manchester, but the depot they had to attend to load up was situated in Wednesbury. Their employment contracts also stipulated that their place of employment was Wednesbury. Because of the cost of commuting, EXOL agreed to make available secure parking for the employees' HGVs in Stockport, near their homes. They would then drive from their homes to Wednesbury and the journey to and from Stockport was treated as part of their working day for which they were paid.

A time came when the company could no longer afford to pay for the secure parking in Stockport and gave notice to terminate this arrangement. The employer sought to argue that there was a fair reason for dismissal, namely redundancy, on the basis that Stockport was the claimants' place of work rather than Wednesbury. It therefore argued that the employer had ceased to carry on business in the place where the employee was employed. The employment tribunal rejected this proposition. The employees' place of work was not Stockport but Wednesbury, because that was where their working day began and ended. The EAT agreed.

The proper test in determining where the employee is employed for the purposes of the redundancy provisions of the Employment Rights Act 1996 is as follows. First it is proper (but by no means conclusive) to have regard to a contractual provision. Secondly it is appropriate to consider, depending on the facts of the case, any connection the employee may have with a depot or head office. Here, the employees' contractual place of work was at Wednesbury and, secondly, they had a close connection with the Wednesbury depot. There was therefore no redundancy situation at Wednesbury because the job and the need for people to do it remained. As the employer advanced no other potentially fair reason for dismissal, the dismissals were unfair.

5: When are employees assigned to a service changing hands under TUPE?

The question is to be determined having regard to the way an organisation is structured and the employee's contractual duties within it, said the EAT in ***London Borough of Hillingdon v Gormanley.***

Robert Gormanley Limited (RG) was a firm employing three members of the same family. It carried out painting and decorating work for the housing stock operated by the London Borough of Hillingdon. Hillingdon then told RG that it was not going to be given any more work and took the service back in house.

A central question was whether the three employees were assigned to an organised grouping of employees, the principal purpose of which was to carry out the activities concerned on behalf of Hillingdon, the client. The Employment Judge (following the finding of another EJ at a pre-hearing review), held that the employees were assigned to an organised grouping of employees working within RG Limited on behalf of Hillingdon.

However the decision was overturned by the EAT. Neither Employment Judge had made findings of fact relevant to the assignment issue.

The key authority on the definition of assignment remains the CJEU decision in *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1985] ICR 519. This ruling requires consideration of the contractual duties of employees and their role in the organisational framework of the putative transferor. In the present case, both Employment Judges had failed to consider the organisational framework within which the employment relationships of the employees took effect. The EAT considered that, as the claimants could be called up on to perform other duties other than for Hillingdon under their contracts of employment (for example one of the employees was company secretary), the ruling that the employees were assigned to the Hillingdon contract had to be set aside.

6: Fair dismissal on performance capability grounds

In ***Millet v Tesco Stores Limited*** the EAT considered an appeal from an employment tribunal which had dismissed a claim for unfair dismissal by a former warehouse operative employed by Tesco Stores Limited. Mr Millet was employed as a warehouse operative, principally engaged in stock picking at Tesco's Daventry Distribution Centre. He had been employed for nearly 7 years.

His performances, particularly his pick-rate, were the subject of numerous informal and formal meetings from November 2008. In all, there were 14 informal discussions and 2 formal discussions about Mr Millet's performance before he was placed into a performance plan.

He suffered from a back condition which caused him to be off sick for 3 months in 2011 and 1 month in 2012. However he declared that his medical condition was not the reason for his underperformance and he made no claim for disability discrimination. Nonetheless the employer referred him to Occupational Health and adjustments were made to his working pattern by way of a performance plan, reducing the number of hours spent picking, and limiting his target to 85% of the full expected rate. He still continued to underperform. Disciplinary proceedings

followed. There was an oral warning, a first warning and a final written warning, but his performance did not improve despite those warnings. Eventually he was dismissed following a disciplinary hearing and he unsuccessfully appealed against his dismissal.

Dismissing Mr Millet's claim for unfair dismissal the Employment Judge characterised Mr Millet's position as "hopeless". The EAT agreed.

7: Exchange of emails constituted a settlement agreement

In a High Court case concerning complex trust and commercial litigation the Court held, in *Bieber & Others v Teathers Ltd (in liquidation)* [2014] EWHC 4205 (Ch), that the parties to the case had reached a binding settlement by an exchange of emails between their respective solicitors.

Just before the trial was to go ahead the claimants accepted, by email, a settlement offer from the defendant which was simple, to the point, and focused on the sum of money offered to be paid to the claimants. The defendant then sent a long form settlement agreement including indemnities and all the usual safeguards. But the claimants refused to sign it on the basis that an agreement had already been concluded and that was that. The High Court Judge held there was a final and binding agreement on the mere exchange of emails without the need to agree further terms. The agreement was not subject to contract and it was expressed to be in full and final settlement of all claims between the parties.

It is therefore very important, when making offers to settle a case, that correspondence is marked both “without prejudice” and “subject to contract”. Or, more elaborately, in the correspondence, it should be specifically stated that the offer is subject to the provisions of a settlement agreement to be drafted by the employer. And the *Bieber* case was of course not an employment tribunal case concerning statutory employment rights. If it had been, a contract by way of exchange of emails alone would not have been effective to bar off statutory employment claims such as unfair dismissal. A settlement agreement under the Employment Rights Act 1996 must always be used for that purpose (see our client briefing below). Hence again, the importance of making any offer to settle a case “subject to contract”.

8: TUPE and the aftermath of The Rangers Football Club liquidation

Following the liquidation of The Rangers Football Club a claim has been instituted by employee representatives about whether the Club, in liquidation, failed to inform and consult employee representatives about the TUPE transfer of players to a new company formed for the purposes of the purchase of the Club. The case has not reached fruition but an interesting interlocutory point has arisen in ***The Rangers Football Club Limited (formerly Sevco Scotland Ltd) v (1) Professional Footballers Association Scotland (2) RFC 2012 Plc (in liquidation).***

When the claim was first made by the Professional Footballers Association Scotland (PFAS) it was asserted in the ET1 that the PFAS was a representative body for professional footballers. (It in fact represents the interests of 800 members who are professional footballers affiliated to various football clubs within Scotland). As such, it claimed to be an appointed employee representative within the meaning of regulation 13(3)(b)(i) of TUPE.

The regulation states:

"(3) For the purposes of this Regulation the appropriate representatives of any affected employees are -

(a) If the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union; or

(b) In any other case, whichever of the following employee representatives the employer chooses -

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulations who…have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees for the purposes of this regulation."

The status of the PFAS as an appointed employee representative was challenged and further and better particulars were required of the assertion that PFAS was an appointed representative for the purposes of regulation 13(3)(b)(i). The claimant sought to amend its application by, instead, asserting that it was a recognised trade union and for that, different, reason, was an appropriate representative. This too was challenged. Section 8(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that if, in any proceedings before a tribunal, the question arises whether a trade union is independent and there is no certificate of independence in force, the question is not to be decided in the proceedings before the tribunal but, instead, the proceedings are to be sisted (adjourned) until a certificate of independence has been issued or refused by the Certification Officer. By section 8(5) the tribunal has power to refer the question to the Certification Officer.

The claimant's application to amend was disputed. Whether permission may be given to amend an ET1 is a matter for the tribunal's discretion (Selkent Bus Co Limited v Moore [1996] ICR 836). There the respondent objected to the application to amend on ground of delay and other prejudice. The claimant responded that the amendment was not a new claim brought out of time but, rather, was a reformulation of the existing claim, which did not change the identity, but merely the capacity, of the claimant. Employment Judge Wallington QC allowed the amendment, applying the principles in the Selkent case and adopting the reasoning of the EAT in Enterprise Liverpool Limited v Jonas UKEAT/0112/09, a case where it was held that the substitution of a trade union for individual employees as a claimant in a case alleging breach of regulation 13 was simply a re-labelling exercise, for which permission would be given. And he found there was no real prejudice to the respondent in allowing the amendment.

The respondent appealed, arguing on a number of grounds that the tribunal had erred in law in allowing the amendment and, secondly, that the Judge's discretion was exercised in a manner, said the respondent, which would have led a fair minded and well informed observer to conclude there was a real possibility of bias. (It was alleged, for example, that reference to “the disintegration of Rangers” was unhelpful and the Employment Judge's general approach, it was suggested, was that he had taken the view that the amendment would be likely to be allowed from the outset).

In a lengthy judgment of 23 pages Lady Stacey, sitting alone in the EAT, rejected the respondent's challenge to the amendment. The allegations of bias were not made out. And as far as the discretion to allow the amendment, the employment tribunal was entitled to make decisions concerned with case management provided that it acted within the rules of procedure, which it did. Finally, the objection made that an assessment of whether a trade union was independent could not be made retrospectively was rejected. In *Bone v North Essex Partnership NHS Foundation Trust* [2014] EWCA Civ 652 Lord Justice Jackson had recently opined that, when necessary, the

Certification Officer can determine the historic status of a trade union and this dictum was applied by Lady Stacey in the present case.

The next instalment in this litigation is awaited.

9: Client Briefing: Settlement Agreements

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 sets out the key issues an organisation should consider before entering into a settlement agreement with an employee.

What is a settlement agreement?

A settlement agreement (formally known as a compromise agreement) is a legally binding agreement between an employer and an employee and which the employee agrees to settle their potential employment claims and, in return, the employer will agree to pay financial compensation. Sometimes the agreement will include other things of benefit to the employee, such as an agreed reference letter.

In what circumstances will a settlement agreement be appropriate?

- An employee may have claims against an employer under both their contract of employment and under statute. These claims may arise:
  - on recruitment;
  - during employment; or
  - on termination of their employment.
- In many cases, an employer may want to make a payment to an employee in return for an effective waiver of their potential claims. Employers can still enter into an agreement with an employee to settle potential claims when they are still working for the organisation, but in most situations their employment will have ended (or will be about to end).

What are the legal requirements for a valid settlement?

To validly settle statutory employment claims, a settlement agreement must satisfy several conditions that must be met.

- The agreement must be in writing.
- The agreement must relate to a particular complaint or particular proceedings.
- The employee must have received legal advice from a relevant independent adviser (for example a qualified lawyer or union official) on:
  - the terms and effect of the proposed agreement; and
  - its effect on their ability to pursue any rights before an employment tribunal.
- The independent adviser must have a current contract of insurance (or professional indemnity insurance) covering the risk of a claim against them by the employee for the advice.
- The employees' adviser must be identified.
- The agreement must state that the conditions regulating settlement agreements have been satisfied.

Possible content of a settlement agreement

Other than the legal requirements listed above, the contents of a settlement agreement are largely at the discretion of the organisation and the employee involved. Examples of common clauses include:

- Compensation for loss of employment.
- Contribution to legal fees.
- Waiver of claims by the employee, including a warranty that the claims listed are the only claims which the employee has against the employer.
- Reassertion or modification of existing restrictive covenants.
- Return of the employer's property.
- Indemnity from the employee in relation to tax and national insurance contributions.
- Undertaking from the employee not to use the employer's confidential information or make any adverse comments about the employer.

Which types of claim can be settled by a settlement agreement?

Only certain statutory claims can be settled by a settlement agreement. These include claims for:

- Unfair dismissal.
- Whistleblowing.
- Discrimination, victimisation or harassment related to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- Equal pay.

Which types of claim cannot be settled by a settlement agreement?

There are several statutory claims that cannot be settled by entering into a settlement agreement including some types of:

- Future personal injury claims (which have not yet arisen).
- Claims for failure to inform and consult in connection with collective redundancies and on a transfer of a business.

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