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Employment Law BULLETIN

Welcome to our June employment law bulletin.

In this issue we comment on two TUPE cases. In *Jakowlew v (1) Nestor Primecare Services Limited t/a Saga Care* the EAT considered that, when a service provider employer declined to go along with a request from its client, a local council, to remove an employee from the service being provided, the employee remained assigned to the service concerned for TUPE purposes. It is not for a third party to dictate whether an employee is assigned; it is for the employer. In *Jinks v London Borough of Havering* the EAT considered whether TUPE applied when a council took a service back in house that had initially been outsourced to a main contractor, and, thereafter, subcontracted to a subcontractor.

In *McElroy v Cambridgeshire Community Services NHS Trust* an employment tribunal ruled that an employee who arrived to work smelling of alcohol was unfairly dismissed having regard to the facts of the case and the employer's written procedures.

In *The Basildon Academies v Amadi* the EAT ruled that an employee was not under an implied duty to disclose allegations of misconduct in the absence of an express contractual obligation to do so. The higher duty to disclose, applicable to directors or very senior managers, was not applicable to other employees.

In *Administrador de Infraestructuras Ferroviarias (ADIF) v Luis Aira Pascual and Others* the Tribunal Superior de Justicia del País Vasco in Spain has asked the European Court whether there is a transfer of an undertaking where a public sector employer takes back in house work that had been contracted out and thereafter uses its own staff instead of those of the contractor.

Our client briefing this month is on the Bribery Act 2010.

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

Family Friendly rights: avoiding discrimination
• Breakfast Seminar, 4th August 2015

and in conjunction with ACAS:

Understanding TUPE: A practical guide to business transfers and outsourcing
• Full Day Conference, **Swansea**, 2nd July 2015

Understanding TUPE: A practical guide to business transfers and outsourcing
• Full Day Conference, **Leeds**, 9th September 2015

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

1. TUPE: A third party cannot dictate whether or not an employee is “assigned” to the undertaking

In *Robert Sage Limited t/a Prestige Nursing Care Limited v O'Connell* (UKEAT/0336/13) an employee was employed by a service provider to look after a vulnerable adult under a service contract with a local Council. The Council then required the individual to be removed from that service, the employer consented and the individual suspended. When in due course the service transferred to another service provider the individual was no longer assigned to the service concerned because of the decision by the employer to withdraw the employee in accordance with the Council's wishes.

The same issue arose in ***Jakowlew v (1) Nestor Primecare Services Limited t/a Saga Care (2) Westminster Homecare Limited,*** but the facts were slightly different. Saga had an organised grouping of employees which worked on a contract for the London Borough of Enfield. Jakowlew was employed as a care manager.

Saga's contract with Enfield included a clause under which the Council reserved the right to reject staff that it considered to be unsuitable for the proposed duties. In June 2013 Enfield wrote to Saga expressing its concerns about three employees and informed Saga of its decision that Saga should remove the three members of staff pursuant to the service contract's conditions. But Saga protested and objected to the instruction. It held disciplinary meetings with the individuals concerned and the outcome was a written warning for conduct.

Westminster took over the contract from 1st July 2013. Saga and Westminster concluded that the claimant should not transfer and eventually the claimant was made redundant by Saga. The individual claimed that she should have transferred to Westminster under TUPE. The question was whether she was assigned to the organised grouping of employees which had, as its primary purpose, the carrying out of the activities concerned on behalf of Enfield. The Employment Judge concluded that immediately before the transfer the claimant had been removed by Enfield from the service provision by virtue of its letter to Saga. Thus, said the Employment Judge, the claimant was not employed in the organised grouping which carried out the Enfield Council contract and, in those circumstances did not transfer, and at all material times remained an employee of Saga.

The claimant appealed. Her case was that the employment tribunal went wrong in treating Enfield's instruction as conclusive of the matter. Her case was that Saga did not act on the instruction. Saga had disputed the instruction and was continuing to dispute it on 1st July 2013 when the transfer took place.

The EAT considered the concept of “assignment” and concluded that the TUPE regulations contemplate assignment by or with the authority of the putative transferor, the employer concerned. It did not consider that this contemplated assignment by the unilateral act of a third party without the employer's intervention or authority. *Robert Sage Limited v O'Connell* could be distinguished. There the local authority had sent a specific request to the employer that the employee was not placed with the particular individual user of the services. But the employer accepted the request and informed the employee that it was not appropriate for her to return to work looking after the user. In more detail the EAT said as follows:

> "Firstly, in [*Robert Sage*] the employer accepted the request of a local authority that the employee not be placed with the employer. In this case Saga did not accept the local authority's instructions. It protested it in the case of all three employees concerned and ultimately the local authority changed its mind in respect of one of the employees. Secondly, in that case [*Robert Sage*], the employee worked with a specific patient, whereas in this case the employee was a manager working in Saga's office. Thirdly, in that case the employee remained under suspension. In this case the employee had been given a written warning. And, while the employment tribunal does not make a finding as to whether it had happened, the employer would be expected to lift the suspension insofar as that it had been imposed pending the disciplinary hearing."

The true test, applying the authority of *Fairhurst Ward Abbotts v Botes Building* [2004] IRLR 304 in the context of TUPE 2006, was whether, immediately before the transfer, the employee would have been required by the employer to work in that group if she not been excused from attendance. Suspension of the employee on full pay pending disciplinary proceedings did not, as such, have the effect of removing the employee from the organised grouping of employees to which she belonged. The suspension was therefore analogous to any other category of excused attendance from work such as holiday, study leave or sickness absence (as in the Botes case itself). The expectation of the parties would be that if the disciplinary proceedings did not end in demotion or transfer, the employee would return to work in the group to which she had belonged. The unilateral instruction of a third party in itself did not de-assign an individual from the organised grouping of employees carrying out the services.

The EAT's analysis was as follows:

> "I can envisage two possible scenarios. Firstly, an employer may ignore an instruction, treating it as unlawful and retaining an employee as part of the working group. That would, no doubt, be a risk in terms of an allegation of breach of contract. But if an employer did so, I do not see why the employee would cease to be assigned to the group in question. Secondly, an employer might protest, attempt to persuade the third party to change its mind and excuse the employee's absence while doing so. If so, it seems to me that, in the ordinary sense of the word, the employee would remain assigned by the employer…while this process continued. Except for the fact that of excused attendance, the group of workers with which it was required to work remained the same."

It would be odd indeed, said the EAT, if an employee were to lose TUPE protection even though the employer had treated her at all material times belonging to the group of workers which transferred.

It was not necessary to remit the case to another employment tribunal. In the EAT's judgment it was plain from the findings of the Employment Judge that up to the relevant date Saga did nothing to remove the claimant from her assignation to the organised group of workers to which she belonged and therefore only one outcome was possible. The individual was assigned and the appeal was allowed.

2: Was an employee who arrived for work smelling of alcohol unfairly dismissed?

Yes, held an employment tribunal on the facts in *McElroy v Cambridgeshire Community Services NHS Trust* (ET/3400622/14).

A healthcare assistant, Mr McElroy, had worked for Cambridgeshire Community Services NHS Trust from 1 July 2003 to 22 January 2014, when he was summarily dismissed for gross misconduct.

On 21 August 2013, Mr McElroy's line manager was informed by a colleague that he smelt of alcohol. He was then suspended pending an investigation under the Trust's disciplinary policy. The matter was also referred to the Occupational Health (OH) Department of the Trust.

The disciplinary policy included being unfit for duty due to the effect of alcohol as an example of gross misconduct. It did not ban using alcohol at all before coming to work but suggested against it. It stated that in the event of continued misuse, refusal of treatment, or adverse effect on conduct or capability of an employee to perform their role, the disciplinary policy would be applied.

The OH report concluded Mr McElroy was fit to return to work. By this stage the employer had become aware that Mr McElroy had been admitted to hospital in respect of oesophagitis, which could be associated with excess alcohol consumption. However, the OH Department had not been informed of this at the time of the report. In addition, the employee had not submitted sick notes whilst on suspension in line with the Trust's policy.

The employer requested further information from OH and requested the employee attend a further appointment, but he refused. The OH Department was unable to release additional information without the employee's approval. A re-arranged disciplinary hearing was arranged and, following this, Mr McElroy was dismissed. Mr McElroy appealed against the decision. His appeal was rejected and he brought an unfair dismissal claim.

The employment judge held that Mr McElroy had been unfairly dismissed. It considered that a reasonable employer would not have treated attending for work smelling of alcohol as gross misconduct or conduct justifying dismissal without additional evidence that it had had adverse effects on the employee's ability to do his job. In particular, in the absence of any previous warnings given to the employee, this did not accord with the Trust's own disciplinary policy.

The employer had failed to explain to the employee that the further appointment with the OH Department was in connection with a disciplinary matter and would be discussed at the meeting as part of that process.

All charges against an employee should have been considered at the disciplinary hearing and the employee should have been provided with this information in anticipation of the meeting. Any basis for subsequently deciding to dismiss an employee should have been discussed at the hearing and any follow up investigations carried out, as necessary. In addition, due to the employer's policies, a reasonable employer would not have treated the refusal to comply as an act of gross misconduct.

The employment judge found the following. First, Mr McElroy had attended for work smelling of alcohol which was verified by a colleague and his line manager, and, on the facts, it was unlikely that he had drunk only two cans of beer as he had claimed to do so. Secondly, it was agreed that the Trust was reasonable in seeking a second report from the OH in light of the employee's stay in hospital. Mr McElroy was not acting reasonably when he refused to attend the appointment. However, there was no evidence to show that the employee was not capable of working and therefore unfit for work. The fact he smelt of alcohol did not amount to gross misconduct in order to justify dismissal. Thirdly, the employer should have identified the charge of not attending the appointment as serious to the employee before the hearing. It should have been highlighted that this potentially, at least in part, could amount to gross misconduct.

Finally, the dismissal letter made reference to the OH appointment as being a supportive measure and a reasonable employer would also have taken into account the fact that its substance misuse policy stated that refusal to agree to take part would not be a ground for disciplinary action of itself.

3: Is an employee under an implied duty to disclose allegations of misconduct in the absence of an express contractual obligation to do so?

No, held EAT in ***The Basildon Academies v Amadi.***

All employees are bound by the duty of fidelity and it is an implied term of the employment contract. This duty is wide-ranging and can incorporate a number of obligations, including the disclosure of wrongdoing in certain circumstances. However there is no general duty on employees to disclose their own misconduct to their employer (Bell v Lever Brothers Ltd [1932] AC 218). The only exception is where an employee owes fiduciary duties to his employer, such as a director or senior manager in a company.

Mr Amadi worked as a part-time tutor at The Basildon Academies for two days a week, Thursday and Friday. The terms and conditions of his employment were set out in a letter dated 26 October 2011 and referred to other documents. One of the documents was Basildon's Code of Conduct. Clause 8 of the employee's terms and conditions set out the employee's obligations in relation to safeguarding children, young and vulnerable adults with reference to national standards and Basildon's policy.

In September 2012, Mr Amadi accepted a zero hours contract to work three days a week at Richmond upon Thames College from Monday to Wednesday. He did not notify Basildon about this. That was a breach of an express term in his contract.

On 19 December 2012, Mr Amadi was suspended by Richmond as a result of a female pupil accusing him of sexually assaulted her. He was arrested and bailed.

In March 2013, the police contacted Basildon to make enquiries regarding his employment there. The police informed them that Mr Amadi had been suspended from his employment with Richmond. Basildon then suspended Mr Amadi. A disciplinary hearing was held in July 2013 and he was

dismissed with immediate effect for first, failing to inform Basildon of his employment with Richmond and secondly, not informing it of the allegation of sexual misconduct.

An employment tribunal held that Mr Amadi had been unfairly dismissed. However, he had contributed towards the dismissal by 30% due to not informing Basildon of his employment with Richmond, which was a breach of contract. Basildon appealed to the EAT against the finding of unfair dismissal and the amount of the compensatory award.

The EAT upheld the tribunal's decision that there is no implied duty on an employee, in the absence of an express duty, to disclose to his employer allegations of sexual misconduct made against him whilst working elsewhere.

The employment contract, set out in additional documents, did include express terms requiring disclosure of misconduct in certain circumstances. However, the employer failed to bring those to the tribunal in evidence. As a result, the employer was unable to establish that the existence of this express duty in these particular circumstances.

This is a stark warning to employers to ensure they have the correct documentation when preparing for these types of claim and reminds employers there is no implied duty on employees to disclose their own misconduct or allegations about misconduct. Therefore, it requires an express term to be clearly drafted in the employment contract. This is even more crucial for part-time or atypical workers to ensure all circumstances are covered.

4. TUPE: Subcontracting and service provision change

In ***Jinks v London Borough of Havering*** the EAT considered whether TUPE applied when a Council took a service back in house that had initially been outsourced to a main contractor, and thereafter, subcontracted to a subcontractor. Was this a service provision change under Reg 3(1)(b) of TUPE?

The facts were that the Council had a site comprising the Romford Ice Rink and an associated carpark. The Council contracted out the management of the whole site to a company called Saturn Leisure Limited. Saturn then subcontracted the management of the car parking element to Regal Carparks Limited. Regal made the car parking spaces available to others, primarily by issuing permits to the staff of the local NHS Trust.

In mid-April 2013 the ice rink closed. Shortly thereafter the car parking activities ceased. Saturn gave up occupation of the whole site at the end of April 2013 and the Council immediately took control of the entire site and closed the car park. (It subsequently granted a licence to the NHS Trust to use the car park for its staff before finally converting it a few months later into a public use car park).

The claimant's case was that he had previously been employed by Saturn and that, from mid-April 2013 his employment had transferred to Regal. So, he said, when the Council had taken upon itself the function of operating the car park his employment transferred to the Council by way of a service provision change TUPE transfer. Because the Council did not accept him as a Council employee he claimed constructive unfair dismissal.

However, the Employment Judge struck his claim out as having no real prospect of success. This was because, according to the Employment Judge, the client in the service provision change

mechanism was not the same. He took the view that the client which engaged Regal was Saturn. The Council then took back control of the property. There was no direct contractual link between the Council and Regal and the Council was therefore a different client altogether. For that reason, there could not be a service provision change under TUPE.

Before the EAT it was accepted that, in view of the authorities of *SNR Denton LLP v Kirwan* [2013] ICR 101 and *Hunter v McCarrick* [2013] ICR 235, and for the purposes of a service provision change, the activities carried out before and after the putative transfer must be carried out for the same client. It was therefore argued that to proceed with his claim the claimant needed to show there was a reasonable prospect of showing that the Council was Regal's client. The Employment Judge of course found that only Saturn could have been the client of Regal for these purposes.

The EAT noted that in regulation to 2(1) of TUPE the word "contractor" is to be treated as including the word "subcontractor" . Interpreting it this way, regulation 3(1)(b)(iii) should be treated as reading:

> "…activities ceased to be carried out by a [subcontractor]…on a client's behalf…and are carried out instead by the client on its own behalf"

The EAT considered that the question should be asked, prior to the alleged transfer who was Regal running the carpark for or "on behalf of" ? Who was its client or customer? Thus:

> "…if A contracts with B to provide it with a service, A is obviously the customer or client. If B then subcontracts to C to provide part of that service, plainly B is, or at the very least maybe, the client or customer of C. But can A also be, by virtue of the sequence of transactions, a client of C in respect of the service that it provides?"

So in the initial sense, Saturn's client was the Council. Regal's client was Saturn. The question was whether it could be said, additionally or alternatively, that the Council was also the real or ultimate client of Regal in respect of the car parking service.

The EAT considered that the Employment Judge had taken a narrow and legalistic approach and that strict legal or contractual relationships do not necessarily answer the service provision change question.

In the EAT's judgment there were three important principles established by the EAT previously in *Horizon Security Services Ltd v Ndeze* (UKEAT/0071/14/JOJ). These were as follows:

> "The first principle is that the question of who is the client for regulation 3 purposes is one of fact, not law. Secondly, the principle that there could be more than one "client" in any given case. Thirdly the principle that the terms of regulation 3(1)(b)(iii), read together with regulation 2(1). Together they show that the person on whose behalf services are provided by a subcontractor may not necessarily be the contractor from whom the subcontract is held"

Given this, the Employment Judge had wrongly directed himself in law. He had not taken into account the effect of regulation 2(1) on regulation 3(1)(b) and he did not have the benefit of the EAT's decision in Horizon when handing down his decision.

The case was remitted to the employment tribunal for a proper consideration of the proposition that, despite the existence of a contract and subcontract, the real or ultimate client of the subcontractor was the principal (the Council) in the chain of contracts.

5. New case on transfer of undertakings is referred to the European Court

The Tribunal Superior de Justicia del País Vasco in Spain has referred a case on transfer of undertakings to the European Court for a preliminary ruling. In *Administrador de Infraestructuras Ferroviarias (ADIF) v Luis Aira Pascual and Others* (Case C-509/14) the European Court is being asked to consider whether there is a transfer of an undertaking where a public sector employer takes back in house work that had been contracted out and thereafter uses its own staff instead of those of the contractor.

The precise question referred is as follows:

> "Does Article 1(1)(b) of Council Directive 2001/23/EC of 12 March 2001, in conjunction with Article 4(1) thereof, preclude an interpretation of the Spanish legislation intended to give effect to the Directive, to the effect that a public-sector undertaking, responsible for a service central to its own activities and requiring important material resources, that has been providing that service by means of a public contract, requiring the contractor to use those resources which it owns, is not subject to the obligation to take over the rights and obligations relating to employment relationships when it decides not to extend the contract but to assume direct responsibility for its performance, using its own staff and thereby excluding the staff employed by the contractor, so that the service continues to be provided without any change other than that arising as a result of the replacement of the workers performing the activities and the fact that they are employed by a different employer?"

6. Client Briefing: The Bribery Act 2010

This client briefing provides just 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 outlines the offences introduced by the Bribery Act 2010 and the penalties for committing them. It also highlights practical steps that an organisation can take to help to avoid breaching the legislation.

What is bribery?

Transparency International (a non-governmental anti-corruption organisation) defines bribery as "the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal or a breach of trust" .

Why was the Bribery Act 2010 introduced?

The Bribery Act 2010 was introduced to strengthen the existing bribery and corruption laws in the UK. The Organisation of Economic Cooperation and Development (OECD) had repeatedly criticised the UK system for being weak and ineffective compared with the more robust regimes in other countries, such as the US Foreign and Corrupt Practices Act.

What are the offences under the Bribery Act 2010?

Bribing another person

- A person is guilty of this offence if they offer, promise or give financial advantage or other advantage to another person.
  - To bring about the improper performance of the relevant function or an activity; or
  - To reward a person for the improper performance of a relevant function or an activity.
- The types of function or activity that can be improperly performed include:
  - All functions of a public nature;
  - All activities connected with a business;
  - Any activity performed in the course of a person's employment; and
  - Any activity performed by or on behalf of a body of person
- There must be an expectation that the functions are carried out in good faith or impartially, or the person performing them must be in a position of trust.
- It may not matter whether the person offering the bribe is the same person that actually performs or performed the function or activity concerned.
- The advantage can be offered, promised or given by the person themselves or by a third party.

Being bribed

- The recipient or potential recipient of the bribe is guilty of this offence if they request, agree to receive, or accept a financial or other advantage to perform a relevant function or activity improperly.
- It does not matter whether it is a recipient, or someone else for whom the recipient acts, or requests, agrees to receive or accepts the advantage. In addition, the advantage can be for the benefit of the recipient or another person

Bribing a foreign public official

- A person is guilty of this offence if they intend to influence an official in their capacity as a foreign public official. The offence does not cover accepting bribes, only offering, promising or giving bribes. It does not matter whether the offer, promise or gift is made directly to the official or by a third party

Failing to prevent bribery

- An organisation is guilty of this offence if a person associated with it bribes another person, with the intention of obtaining or retaining a business or a business advantage for the organisation. The offence can be committed in the UK or overseas.
- An organisation can avoid conviction if it can demonstrate that it had adequate procedures in place designed to prevent bribery.

What the penalties for committing an offence?

- The offences of bribing another person, being bribed and bribing a foreign public official are permissible on indictment either by an unlimited fine, imprisonment of up to 10 years or both.
- Both a company and its directors could be subject to criminal penalties.
- The offence of failure to prevent bribery is punishable on indictment by an unlimited fine.
- Organisations convicted of corruption could find themselves permanently debarred from tendering for public sector contracts.
- An organisation may also be damaged by adverse publicity if it is prosecuted for an offence.

Practical steps to held avoid liability under the Bribery Act 2010

Top level commitment

- All senior managers must understand that they could be personally liable under the Bribery Act 2010 for offences committed by the organisation. It is important that senior management lead the anti-bribery culture of an organisation, especially if the organisation wants to take advantage of the "adequate procedures" defence to the offence of failing to prevent bribery.

Risk assessment

- Consider all the potential risks the organisation may be exposed to.
- Think about the types of transactions the organisations engages in, who the transactions are with and how the transaction is conducted. High risk transactions include:
  - Procurement and supply chain management;
  - Involvement with regulatory relationships (for example, licences or permits); and
  - Charitable and political contributions.
- Review how the organisation entertains potential customers especially those from government agencies, state owned enterprises or charitable organisations. Routine or expensive corporate hospitality is unlikely to be a problem, but clear guidelines should be put in place.
- If the organisation operates in foreign jurisdictions, always check local laws.

Implementing and communicating an anti-corruption code of conduct

- Implement a code of conduct setting out clear practical and accessible policies and procedures that apply to the entire organisation. Make sure the code is communicated effectively to all parts of the organisation.

Carry out background checks when dealing with third parties

- An organisation will be liable if a person associated with it commits an offence on its behalf. Organisations should therefore review all their relationships with any partners, suppliers and customers. For example if an agent or distributor uses a bribe to win a contract for an organisation, that organisation could be liable. Ensure that background checks are carried out on agents or distributors before they are engaged by the organisation.

Policies and procedures

- Review any existing policies and procedures and decide whether they need to be updated. If the organisation does not have any policies or procedures in place, consider preparing them as a matter of urgency.

Effective implementation and monitoring

- Consider introducing a compulsory training programme for staff. If only a few employees operate in a high risk area, consider targeting the training at those employees.
- Ensure anti-corruption policies and procedures are continually monitored for compliance and effectiveness, both internally and externally.

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