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Employment Law BULLETIN

Welcome to our August employment law bulletin.

In this issue we cover the important Court of Appeal decision in *NHS Leeds* v *Larner* in which it has been held that a worker who has not taken paid annual leave in the relevant year due to sickness can claim a payment in lieu on termination of employment without having made any prior request to carry the leave forward.

We note two interesting cases on employment status. There is yet another case on service provision change under TUPE.

And the EAT has provided helpful guidance on how employers can avoid disagreements with employees escalating into constructive dismissal claims.

May I remind you of our forthcoming events:
Click any event title for further details.

Equality and Diversity
· A practical HR workshop, 4th September 2012

Unfair Dismissal Update: Handling Sensitive Employee Issues
· Breakfast Seminar, 2nd October 2012

and in conjunction with ACAS in the East Midlands:

Understanding TUPE: A practical guide to business transfers and outsourcing
· Full Day Practical Workshop, 10th October 2012

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1: Can a worker, who has not taken paid annual leave in the relevant year due to sickness, claim a payment in lieu on termination of employment without having made any prior request to carry the leave forward?

Yes, said the Court of Appeal in *NHS Leeds v Larner*

Mrs Larner was absent on sick leave for the whole of the leave year 2009/10. During that year she neither took paid annual leave nor requested NHS Leeds to carry it forward to the next year (2010/11). Early on in that year she was dismissed. NHS Leeds refused to pay her for the leave not taken by her in 2009/10. She claimed a payment in lieu of the untaken leave.

Under European law, and the interpretation of Article 7 of the Working Time Directive, holiday pay continues to accrue during periods of absence due to sickness (*Stringer v Revenue & Customs* (Case C-520-06); *Schultz-Hoff v Deutsche Rentenversicherung Bund* (Case C - 350/6)) and an employee who is prevented from taking annual leave through sickness must be allowed to take their annual leave that they missed later in the year, or if that is not possible, in a subsequent leave year (*Pereda v Madrid Movilidad* (Case C-227/8); *Asociatión Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicates (FASGA)* (Case C-78/1). The Court of Appeal pointed out that the most recent ECJ decision, *Georg Neidel v Stadt Frankfurt am Main*

(Case C-337/10, 3 May 2012) supported the claimant's case that Article 7 of the Working Time Directive does not impose any requirement of prior leave request.

Article 7 had direct effect against NHS Leeds as an emanation of the State. Therefore, in Mrs Larner's case, as her employment was terminated before she could take her carried forward leave, she was entitled to payment on termination for the paid annual leave she had been prevented from taking, irrespective of any prior request to carry forward the leave.

The Court also stated that, had it been necessary (in the case of a private employer) to decide the case under the Working Time Regulations, these could be construed, purposively, to give effect to the position under Article 7 of the Directive.

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2: When carers employed by a contractor were engaged under a zero hours contract, was it open to a tribunal to find they were employed under a global contract of employment, with continuity preserved throughout?

Yes, said the EAT in *Pulse Healthcare v Carewatch Care*

In this case, the carers were employed by Carewatch Care Services Ltd, a company contracted to a PCT to provide care for a severely disabled individual. The contract was re-tendered and taken over by Pulse Healthcare. The carers asserted they had TUPE rights against the new contractor.

But as a preliminary point, it had to be established that the carers were employees and, for the purposes of any claims they might wish to make, whether they had continuous service.

The carers were given a zero hours contract. It stated there was no obligation to provide work and the employees were ostensibly free to work for another employer.

The employment tribunal found that the contract given to the carers did not reflect the true agreement between the parties. In practice they performed services, were obliged to carry out the work offered and had to do it personally. Finally, the argument that these were individual discrete contracts as opposed to a global umbrella arrangement did not stack up. Carewatch was providing a critical care package "of a most challenging kind". The employment tribunal described it as "fanciful" to suppose that the employer relied only on ad hoc arrangements in the provision of such a service.

Therefore the employment judge was entitled to hold that the claimants were employed by Carewatch under global contracts of employment with full continuity. The issue of whether, as employees, they actually transferred to Pulse under TUPE was remitted to an employment tribunal for further deliberation.

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3: Was a GP carrying out hair restoration procedures for a private clinic a "worker" for the purposes of employment legislation?

Yes, held the Court of Appeal in *The Hospital Medical Group Limited v Westwood*

Dr Colin Westwood is a GP with his own practice. Having developed an interest in minor surgery, he was approached by Hospital Medical Group Ltd to undertake procedures relating to hair restoration on its behalf. HMG engages surgeons with practices in their own right and none are engaged on contracts of employment. Mr Westwood's engagement was terminated. An employment tribunal ruled he was not an employee but found he was a worker under section 230 (3)(b) of the Employment Right Act 1996 in order to hear claims relating to unlawful deductions from wages and accrued holiday pay. The EAT agreed.

The Court of Appeal upheld these decisions.

HMG's principal argument was that the definition of worker in s 230(3)(b) excludes a person who provides services to a "client or customer" of any profession or business carried on by him.

But the Court of Appeal held that it was wrong to regard HMG as Dr Westwood's "client or customer". HMG was not just another purchaser of Dr Westwood's medical skills. Apart from his other work he contracted specifically and exclusively to carry out hair restoration surgery on behalf of HMG and was referred to as "one of our surgeons". He was clearly an integral part of HMG's undertaking and providing services even though he was in business on his own account.

4: Can an employer stop an incident escalating into a breach of trust and confidence by the employer by intervening and supporting the employee?

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You may remember the celebrated Court of Appeal case of *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121 where it was held that it was not possible for an employer at fault to cure a repudiatory breach of an employee's contract. In that case exam papers marked by Professor Buckland had bee re-marked without his knowledge. This was a breach of the duty of trust and confidence. Although there was a subsequent internal investigation into the matter, which vindicated Professor Buckland, this could not cure the prior breach and Professor Buckland was entitled to rely on it to claim constructive dismissal.

But surely the employer can take some steps to diffuse a situation before it gets to the stage of repudiatory breach of trust and confidence? The EAT has confirmed this in *Assamoi v Spirit Pub Company (Services) Ltd* . Assamoi worked for Spirit in the kitchens of its West London pubs. The manager, Mr Cooper, accused him of being absent without leave and suspended him pending an investigation. In point of fact Mr Assamoi had been away on a pre-arranged period of leave and was not in the wrong at all. Two managers from two other pubs held investigatory meetings with Mr Assamoi; accepted his point and told him no action would be taken and any references to his suspension would be removed from his record.

Subsequently, Mr Assamoi demanded an apology from Mr Cooper, which was not forthcoming. Mr Assamoi resigned claiming constructive dismissal. His argument was

that Mr Cooper had behaved so badly in the first instance that it was a repudiatiory breach of contract and it could not be cured by the investigation carried out by the two other managers. However the EAT held that this was a shade removed from *Buckland*. Mr Cooper had behaved badly but no so seriously as to justify Mr Assamoi resigning. And the fair-minded way in which the other managers had dealt with the matter at the investigatory meeting prevented it escalating into a state of affairs that would have justified him leaving. This therefore was a case of preventing a breach from occurring, rather than trying to cure a breach and Mr Assamoi's claim for constructive dismissal failed.

So, notwithstanding the severity of the decision in *Buckland* it is always worth an employer trying to retrieve a situation where a manager has exceeded himself and behaved badly to an employee. If that behaviour is so serious in itself to amount to a repudiatory breach an employer's investigation cannot cure it. But if it has not gone that far, as subsequent investigation can prevent an ultimate claim for constructive dismissal against the employer.

5: Is it a good idea for employment judges sitting alone to hear unfair dismissal cases?

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The EAT (Lady Smith) expressed some reservations about this in *McCafferty v Royal Mail*

In this case the claimant was a postman with 19 years service dismissed for gross misconduct by reason of alleged dishonesty. The decision was a majority one. The lay members found the dismissal fair. The employment judge, in the minority, considered that the dismissal was unfair.

On appeal, the decision of the majority was upheld. The majority were entitled, on the evidence, to conclude that there was a reasonable basis on which to conclude there had been fraud and that the response of the employer was within the band of reasonable responses. In contrast, the employment judge had, in the view of Lady Smith, substituted her own views for that of the employer "despite her prefacing them with a self denying ordinance to refrain from so doing".

Lady Smith pointed out that the lay members of the employment tribunal reached a different conclusion (in her opinion the right one) on the facts of the case, drawing on their "valuable common sense", than that of the employment judge. She articulated her concerns about the effect of the Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 SI 2012/988 which now allows an employment judge to hear unfair dismissal cases sitting alone.

Many have considered the move away from the "industrial jury" (see *Williams v Compair Maxam Ltd* [1982] ICR 156) as a step in the wrong direction. Lady Smith seems to think so too. She remarked that this underlines the need to give careful consideration to any views expressed by parties as to whether proceedings should be heard by an employment judge and members (Employment Tribunals Act 1996, Section 4(5), the provisions of which are still in force).

6: TUPE, service provision change and assignment to an organised grouping of employees

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For an employee to be transferred under TUPE either on a transfer of an undertaking or a service provision change that employee has to be assigned either to the undertaking or to an organised grouping of employees the principal purpose of which is to carry out activities on behalf of the client.

In *Edinburgh Home-Link Partnership v The City of Edinburgh Council* two charities, Homeless Outreach Project and Home-Link provided services to homeless persons in the Edinburgh area. Certain activities, namely the provision of visiting support for people in need, were carried out on behalf of Edinburgh Council under a service agreement. In April 2009 the Council decided that it would take those activities back in-house. This was a service provision change under TUPE. The case concerned whether two executives working for the charities, Mr McAleavy and Ms Morrison, were assigned to the organised grouping of employees carrying out those activities on behalf of the Council. An employment tribunal found that there was an organised grouping of employees dedicated to service delivery under the Edinburgh contract. But it found that the two executives were not assigned to it.

Their roles involved significant strategic matters and in Mr McAleavy's case, working closely with Home Link's board of trustees and its chair. Apart from the front line service delivery there were many other matters for which the two were responsible. On the whole their roles were largely strategic, involved the maintenance of the organisation itself and were not concerned with direct involvement with service delivery. Accordingly, the two were not assigned to the organised grouping of employees in order to transfer under TUPE.

The employment tribunal's decision was appealed to the EAT. The EAT decision is a lengthy one, running over much of the facts of the case and the arguments before the employment tribunal as the claimants were trying to upset the findings of the tribunal on the ground of perversity. The EAT rejected their appeal and upheld the tribunal's decision. Lady Smith, drawing on traditional assignment authorities such as *Buchanan-Smith v Schleicher and Company International Ltd* (EAT/1105/94) and *Duncan Web Offset (Maidstone) Ltd v Cooper* [1995] IRLR 633 commented as follows

"*regarding the Reg 4 issue of assignment, the question has to be asked in respect of each individual employee."* It is not to be assumed that every employee carrying out work for the relevant client is assigned to the organised grouping. It is not difficult to envisage circumstances involving an organised grouping of employees whose principal activity is the provision of the service for which a particular client is contracted where an individual and employee working with them at the date of transfer could not be said to have been assigned to the grouping since he normally did other work and was only helping out, on a temporary basis. Likewise, whilst at first blush it might be thought that all employees of the transferor in a "single client" case would be assigned to the carrying out of the activities the client requires, it may, on closer examination, be found that this is not the case. *If, for instance, an employee's role is strategic and is principally directed to the survival and maintenance of the transferor as an entity, it may then not be established that the employee was so assigned.*"

7: TUPE transfers and the Fair Deal policy

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The *Fair Deal* policy requires provision of broadly comparable pensions where staff are compulsorily transferred from the public sector to a new non-public sector employer such as a contractor for services. When the *Fair Deal* is applied, it requires that the new employer provides a broadly comparable pension scheme for transferred staff and bulk transfer arrangements for those staff who wish to transfer their public service pension and benefits.

As part of the public sector pension reforms HM Treasury announced a review of the *Fair Deal* policy in March 2011. Consultation closed on 15 June 2011.

Now, HM Treasury (the Chief Secretary to the Treasury - Rt Hon Danny Alexander) has stated that the Government intends to maintain the overall approach of the Fair Deal policy but instead, proposes to deliver this by offering access to public service pension schemes for transferring staff. When implemented that would mean that all staff whose employment is compulsorily transferred from the public service under TUPE, including subsequent TUPE transfers to independent providers of public services, would retain membership of their *current* employer's pension arrangements. Those arrangements are intended to replace the current broad comparability and bulk transfer approach under Fair Deal, which in the future, would no longer apply.

The Government is going to bring forward detailed proposals for implementation in the Autumn of 2012.

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