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Click on any of the headings below to read more

3 : European Court declines to give guidance on the effect of the Collective Redundancies Directive on the timing of consultation about multiple redundancies

4 : In what circumstances is a dismissal to effect contractual changes automatically unfair under TUPE, and what is the appropriate remedy?

5 : Was a minicab driver an employee where, under his contract, he could work as and when he liked?

6 : Government Response on Consultation over Trade Union Facility Time and Facilities in the Civil Service

7 : When solicitors for administrators took over activities previously carried out in-house by a company in administration, was there a service provision change under TUPE?

8 : The Government publishes its response to the call for evidence on the effectiveness of the TUPE Regulations

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

1: Chancellor of the Exchequer announces plans for a new kind of "owner-employee" employment contract

BACK TO TOP

According to proposals made by the Rt Hon George Osborne MP on 8 October 2012 employees who elect to become "owner-employees" will be able to exchange some of their UK employment rights for rights of ownership in the form of shares in the business they work for and gains on such shares would be exempt from capital gains tax.

According to the Treasury statement companies of any size would be able to use this new kind of contract but it is principally intended for fast growing small and medium sized companies that want to create a flexible workforce. Under the new type of contract employees will be given between £2,000 and £50,000 of shares that are exempt from capital gains tax. In exchange they will give up their UK rights on unfair dismissal, redundancy and the right to request flexible working and time off for training and will be required to provide 16 weeks notice of a firm date of return from maternity leave instead of the usual 8. It will not be unlawful for companies to choose to offer only this type of contract for new hires (for existing employees it will be optional).

It is unclear whether the proposal will be attractive either to companies or to employees. Subsequently (18 October) BIS published a consultation document with a remarkably short closure date for responses of 9 November.

2: New amendments to the Enterprise and Regulatory Reform Bill

BACK TO TOP

The Government has published new amendments to the Enterprise and Regulatory

Reform Bill in advance of its report stage and third reading which is due to take place on 16/17 October 2012. The employment-related amendments include proposals to repeal the provisions in the Equality Act 2010 relating to third party harassment and the discrimination questionnaire procedure. There is also a proposal to give employment tribunals the power to order an employer to carry out a pay audit where it has lost an equal pay claim or discrimination claim relating to non-contractual pay, and to extend the circumstances in which tribunals can make deposit orders and order for the recovery of witness expenses for litigants in person.

3: European Court declines to give guidance on the effect of the Collective Redundancies Directive on the timing of consultation about multiple redundancies

BACK TO TOP

USA v Nolan concerns a claim on behalf of civilian employees on a US military base in the UK that they had not been consulted soon enough for the purposes of Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 when, by a decision to close the base, this led to multiple redundancies. The Court of Appeal referred the issue of when consultation should have begun to the European Court.

UK domestic law, contained in Section 188 (which implements the Collective Redundancies Directive) applies to all employers, public or private. But Article 1(2)(b) of the Collective Redundancies Directive excludes public administrative bodies or establishments governed by public law.

The Court held that it was not possible for it to give an opinion in the present proceedings since the Directive provides an exclusion of public bodies from its scope.

In due course, the Court of Appeal will have to make its own mind up on the question of when consultation should have begun in that case, resolving such issues as any conflict between *UK Coal Mining Limited v National Union of Mine Workers (Northumberland Area)* [2008] IRLR 4, and *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy* [2009] IRLR 944.

4: In what circumstances is a dismissal to effect contractual changes automatically unfair under TUPE, and what is the appropriate remedy?

BACK TO TOP

These questions were addressed by the EAT in *Manchester College v Hazel*

Manchester College successfully bid for Offender Learning contracts from the Learning and Skills Council. The claimants transferred to Manchester College under TUPE.

There were hidden costs which were not appreciated in the due diligence exercise prior to the transfer. The college began a process of costs savings, which included a request for 300 voluntary redundancies. Following this, the college decided to effect further savings by harmonising terms and conditions across 37 different contracts of employment. The Claimants were asked to agree to wage reductions. They objected and were dismissed with an offer of employment on the new terms. They accepted the new

contracts, continued in employment and sued for unfair dismissal.

The majority of the employment tribunal held that the reason for the dismissals was connected with the transfer and not for an economic, technical or organisational reason entailing changes in the workforce. The redundancy process had ended and what was on the employer's agenda now was simple harmonisation of terms and conditions. It was not enough that the college was making some other employees redundant alongside the harmonisation process. It is the reason for dismissal of a particular employee that must entail a change in the workforce of either number or functions. The fact that others are dismissed for the reason of redundancy (a change in the number of the workforce) does not alter the fact that the particular employee may have been dismissed for the reason of harmonisation (not a change in the workforce). The dismissals were automatically unfair. The EAT held this was a correct construction of TUPE.

The employment tribunal considered that the appropriate remedy was re-engagement on their new contracts, but on their old rates of pay. This was practicable since employees had continued working and had the trust and confidence of the employer. The EAT agreed. In its opinion, this remedy was the only way of recognising the breach of TUPE that had occurred.

5: Was a minicab driver an employee where, under his contract, he could work as and when he liked?

BACK TO TOP

No, said the EAT in *Knight v Fairway & Kenwood Car Service*

The claimant was a minicab driver working for Fairway & Kenwood. His written terms provided that, as long as he made weekly rental payments and sent appropriate notifications to the company, he was allowed to work as and when he pleased. He paid his own tax and national insurance and, if registered for VAT, had to account for VAT to HMRC. He left after a disagreement and claimed damages for wrongful dismissal.

The employment tribunal found there was no contract of employment as there was no mutuality of obligation between the parties. The EAT, although expressing some criticism of the way the legal test was applied by the employment judge, dismissed the appeal.

The EAT said that it was "likely" that the claimant was employed either throughout a particular shift or from the beginning to end of an individual job, and there was an overarching umbrella contract. But that umbrella contract was not an employment contract. His written terms did not require a minimum or reasonable amount of work (applying the test set out by Langstaff J in *Cotswold Development Construction Limited v Williams* [2006] IRLR 181). Nor was there scope for inferring such an obligation from the fact that the claimant in fact worked 7 days a week. This meant that there was no jurisdiction to hear the claimant's claim.

6: Government Response on Consultation over Trade Union Facility Time and Facilities in the Civil Service

BACK TO TOP

The Government has published its response to the consultation on the proposed reform of trade union facility time and facilities in the civil service. The consultation sought to review the level, frequency and cost of the provision of facility time to ensure that paid time spent by trade union representatives on duties and activities during working hours is appropriate, transparent and represented true value for money.

The response provides that, other than in exceptional circumstances, trade union representatives will be required to spend at least 50% of their time on their civil service job. Any representative who has spent 100% of their time on union work for the last three years will be able to continue to do so for just one more year, unless they are promoted to a new role before then. The default position for undertaking trade union activities is that it will be unpaid. The changes will be introduced by the Cabinet Office through a central framework, supported by guidance and subject to monitoring. The effectiveness of these changes will be reviewed after they have been in place for a year.

▲ BACK TO TOP

7: When solicitors for administrators took over activities previously carried out in-house by a company in administration, was there a service provision change under TUPE?

No, said the EAT in *SNR Denton UK LLP v Kirwan.*

The Claimant was a solicitor who worked in-house for a facilities management company that ran into financial difficulties. As a result she was engaged for most of her time disposing of service contracts to third parties. Administrators were then appointed, who instructed SNR Denton to act for them in the administration. Their work involved continuing the disposal of the company's contracts. The Claimant argued that there was a service provision change and, therefore, a relevant transfer under TUPE.

This raises not one, but three, interesting TUPE points. First, the employment tribunal had been correct, said the EAT, in finding that the activity of disposal of the company's contracts, which was continued after the handover, was essentially the same as that previously performed by the company in-house.

But the tribunal had been wrong to ignore the fact that the services, previously carried on by the client on its own behalf, had been continued by SNR Denton thereafter on behalf of that same client. Denton was hired by the administrators, not the company. Therefore the client had not remained the same and Regulation 3(1) (b) could not apply (see *Taurus Group Ltd v Crofts* (EAT/0024/12)).

Finally, the question arose whether the activities had been intended to be carried out on behalf of the client for a single specific event or task of short-term duration (in which case the service provision rules are excluded). Although this was not necessary to decide the case, Langstaff J made some helpful observations. He pointed out that textbooks and commentaries focus on the temporal nature of the exclusion. But the real issue for the tribunal should be an examination of the intention of the client as to what should be the period of time of the contract concerned. In failing to look at this, the tribunal fell into error.

8: The Government publishes its response to the call for evidence on the effectiveness of the TUPE Regulations

BACK TO TOP

In November 2011 the Government called for evidence on the effectiveness of the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006. The call ended on 31 January 2012. There were 175 responses from a variety of business organisations, trade unions, charities or social enterprises, lawyers and others. According to the executive summary the following points summarise the main concerns that were voiced:

- Employee liability information should be provided earlier than 14 days before the transfer
- Post transfer harmonisation of terms and conditions of employment with existing employees is difficult to achieve
- The Regulations "gold-plate" the Employment Rights Directive by including service provision changes (this is not required under the Directive)
- There is uncertainly as to how TUPE applies to occupation pensions. Some respondents would welcome guidance on the benefits that do transfer under TUPE
- The Regulations do not specify precisely which insolvency proceedings (where the transferor is subject to them) give rise to Regulations 4 and 7 of TUPE applying and which do not
- The approach to a concept of economic, technical or organisational (ETO) reasons entailing changes in the workforce "needs some repair". Some respondents say *guidance* would help as there is no statutory definition of the phrase or, perhaps, a list of how the ETO reason has been developed by the courts. Others find the rules themselves unduly restrictive, in particular the rule that the ETO reason only applies where there is a change in the numbers or functions performed by the employees. This of course gives rise to problems with regard to dismissals to introduce new employment contracts (no change in the workforce entailed) or where the TUPE transfer involves a change in location, giving rise to a constructive or express dismissal (no change in the workforce entailed).

Having said that, the BIS document acknowledges that there are counter arguments against change, that any change may not be change for the better and, finally, the room for any amendments to TUPE is inevitably limited by the fact that the Regulations implement the Acquired Rights Directive. It will come as no surprise that trade unions are generally content with the Regulations, as they improve clarity and transparency. In effect, approximately 38% of respondents thought that the inclusion of service provision changes within the 2006 Regulations provided benefits in terms of increased transparency and reduced burdens on business. Here again, trade union respondents were particularly content.

In conclusion the *BIS document* says that there are several areas which should be examined further with a view to improving the Regulation's operation and practice, whether by amendments to TUPE or through improved guidance. Amongst the points the Government will consult on in due course are

- Whether the 2006 service provision changes should be retained or appealed;
- Whether, generally, liability should pass entirely to the transferee, as now, will be held jointly and severally by transferee and transferor;
- Whether employee liability information should be provided earlier to the transferee;

- Whether an amendment to TUPE would be possible to ensure that a change of location of the workplace following a transfer does not necessarily lead to automatic unfair dismissal, ie, it is capable of constituting an "economic, technical or organisational reason entailing changes in the workforce".

The document concludes

"There will now be a period of policy design, during which the Government will look at the issues respondents have raised and seek to determine where action might be desirable, engaging with key stakeholders (including employer groups, the unions and legal profession representative groups) to test its thinking. In some cases this may be a proposal to amend TUPE in some respects whilst in other case, improving the guidance might suffice instead".

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