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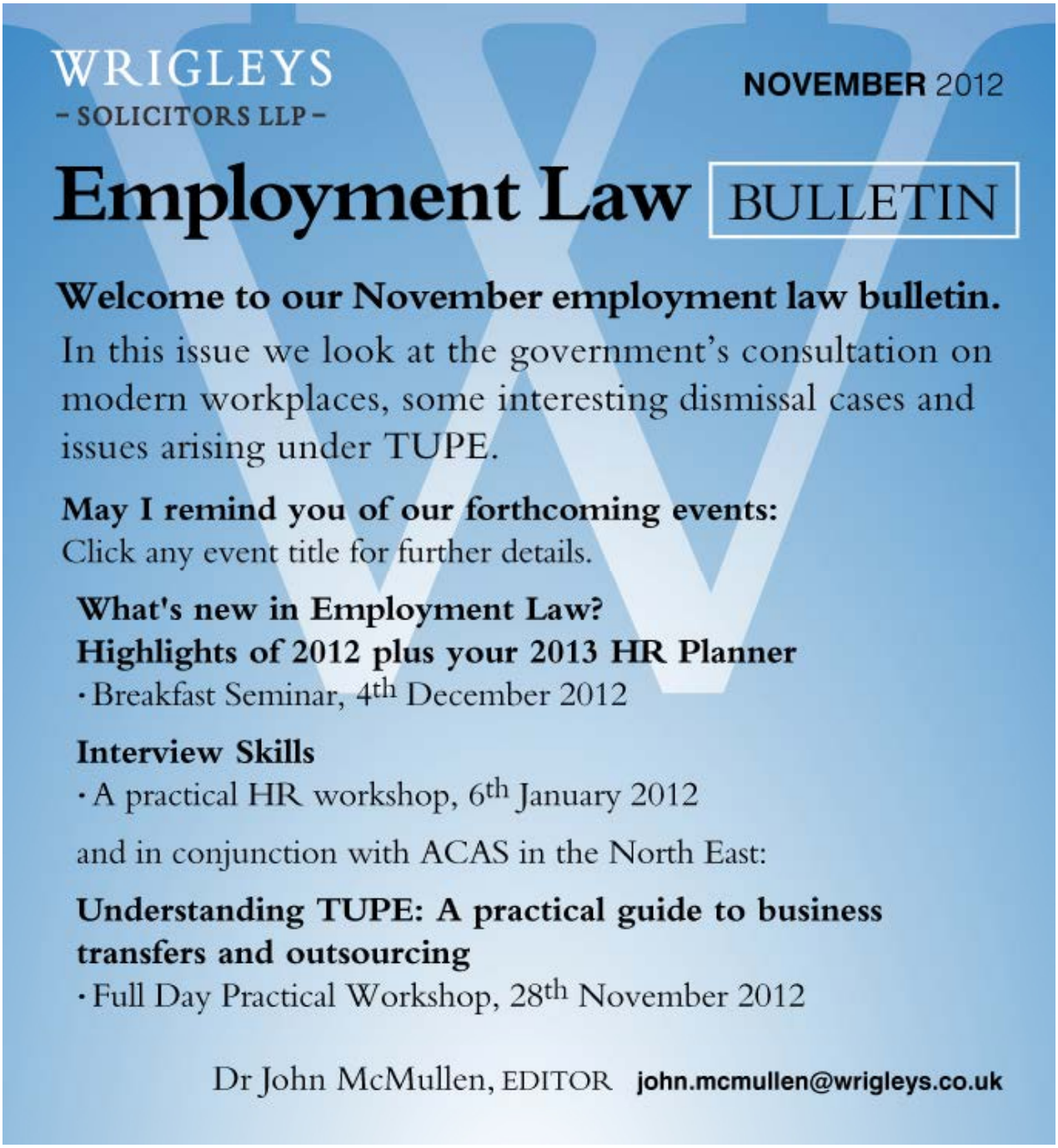

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1: Consultation on Modern Workplaces (1): Flexible Working

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The Government has announced its decision to proceed with the extension of the right to request flexible working. The right will become available to all employees from 2014, provided they have 26 weeks continuous service. The current statutory procedure will be replaced with a duty on employers to deal with requests reasonably, and a statutory code of practice will be issued to give guidance as to how this will work in practice. Guidance will also be issued on how employers should prioritise conflicting requests received form different employees.

2: Consultation on Modern Workplaces (2): Flexible Parental Leave

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The Government has also devised a new system of statutory parental rights to be introduced in 2015. This is designed to allow parents to choose how best to balance their work and childcare responsibilities.

Parents will be able to share the statutory leave and pay that is currently only available to mothers. Flexible parental leave can either be taken by each parent consecutively, or by both parents concurrently, as long as the combined amount of leave does not exceed the amount which is jointly available to the couple. Similar principles will apply to statutory flexible parental pay, which will be available as an alternative to statutory maternity pay. Additional paternity leave and additional paternity pay will be abolished, and there will be no extension to the current statutory paternity rights. The entitlement to unpaid parental leave will be extended from 13 weeks to 18 weeks for each child from March 2013, and

from 2015 each parent will be able to exercise this right for children up to the age of 18.

3: Exceptional case where a redundancy dismissal may be fair notwithstanding the absence of consultation

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In *Ashby v JJB Sports PLC* the EAT upheld a tribunal's decision that the dismissal of a senior HR manager for redundancy was fair, notwithstanding the absence of consultation. The circumstances fell into the category of exceptional cases, identified in *Polkey v AE Dayton Services Ltd*, in respect of which consultation would have been "futile". Although there was an alternative vacancy which the claimant might have been invited to apply for, it was reasonable in the circumstances for the employer not to give him this opportunity, given the financial pressure it was under to make effective changes to management.

Thus, in exceptional cases where consultation will have been "futile" or "utterly useless" an employer may nonetheless be able to avoid unfair dismissal. But we stress these are highly exceptional cases and we strongly advise that consultation and other procedures before redundancy take place in order to avoid the risk of unfair dismissal.

4: Can an employee dismissed for ill health sue for damages if he thereby loses benefits under a PHI policy?

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Not on the facts in *Lloyd v BCQ Ltd* said the EAT.

Mr Lloyd was dismissed because of ill health. One of his claims was that this was in breach of an implied term that the employer would not dismiss him if this had the effect of removing his entitlement to PHI benefit.

In *Aspden v Webb's Poultry and Meat (Holdings) Ltd* [1996] IRLR 521 Sedley J (as he then was) held that there was a term implied into the employee's contract that, notwithstanding an express term allowing for termination for prolonged sickness, this would not be exercised if it had the effect of depriving him of his PHI benefit in the absence of any fundamental breach by him. In *Reda and another v Flag Ltd* [2002] UK PC 38 however, the Privy Council explained that *Aspden* was a case with special facts. On the evidence it was found that it had never been the employer's intention to exercise its contractual right of dismissal where to do so would frustrate the employee's entitlement to income replacement insurance. In *Lloyd* however no such background existed. And Mr Lloyd's contract contained an "entire agreement" clause. This was an express term and there was no scope for the implication of a term which contradicted it. In the alternative, the EAT held that if it were, in a given case, appropriate to imply a term restraining the exercise of the power of dismissal in this context, this could only be actioned where (per the Court of Appeal's view in *Briscoe v Lubrizol* [2002] IRLR 607) the dismissal was "without reasonable and proper cause". In this case, dismissal was for good cause because of the claimant's absence from work and lack of prospect of returning to work.
Finally, in the event, Mr Lloyd had no claim as he received the equivalent of the PHI benefit and had suffered no loss.

5: Pensions ombudsman upholds claim against transferee for failure to set up death in service benefits following a TUPE transfer

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In the case of Mrs G M McUrdy (Case Number 83725-2) the pensions ombudsman upheld a complaint by Mrs McUrdy that she had not been paid a widow's lump sum benefit by Rathlin Island Ferry Ltd because that company failed to make appropriate arrangements when Mr McUrdy's employment was transferred, under TUPE, from Caledonian MacBrayne (CalMac) to Rathlin Island Ferry Ltd.

Mr McUrdy was employed by CalMac on the Rathlin Island ferry service and was a member of the CalMac pension fund. In June 2008 CalMac confirmed to Mr McUrdy that his employment would automatically transfer to Rathlin Island Ferry Ltd on the sale of the business and that pension arrangements would be in place and he would be offered to join the scheme set up by his new employer. On 1 July 2008 Rathlin Island Ferry Ltd took over responsibility for the route. Mr McUrdy's employment was transferred. He became a preserved member in the CalMac fund. He died on 19 July 2008. His final pensionable salary for the purposes of the CalMac fund was £25,417. As a preserved member of the CalMac fund the lump sum and benefit payable was equal to his final pensionable salary. However, had he remained an active member of the CalMac fund his benefit would have been four times his final pensionable salary. Only after his death did Rathlin Island Ferry Ltd establish its own scheme for the provision of a lump sum on death. After some protracted correspondence Rathlin Island Ferry Ltd accepted that they were in the wrong in not having a scheme in place at the time of Mr McUrdy's death and were liable for four times Mr McUrdy's pensionable salary, a total of £101,668. Rathlin Island Ferry Ltd were ordered to pay this sum together with any such sum as would insulate Mrs McUrdy against any tax liability thereon. Further, in view of the delays in dealing with the claim, Mrs McCurdy was compensated £750 for distress and inconvenience.

By virtue of Regulation 10 of TUPE, Regulations 4 and 5 do not apply to so much of a contract of employment or a collective agreement as relates to an occupational pension scheme concerning benefits for old age, invalidity or survivors. Thus, if a life assurance scheme is part of an occupation pension scheme Regulation 10 will prevent the automatic transfer of liability to provide such life assurance benefits. One can only presume from the Ombudsman's decision that liability in this case arose from either a direct contractual promise made to Mr McUrdy at the time of transfer, collateral to his employment contract, or alternatively this was part of the commercial arrangements between transferor and transferee. However, liability may also arise in connection with a death in benefit provision on a TUPE transfer if the death in benefit provision is not in the occupational pension scheme but in a stand-alone scheme. This may arise when pensions are provided through a personal or group personal pension scheme. This is because of the change in definition of an occupational pension scheme made by Section 255 of the Pensions Act 2004.

6: TUPE and service provision change: downturn in client's requirement for services

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In *Department for Education v (1) Huke (2) Evolution Resource Ltd (in liquidation)* (EAT/0080/12) Evolution Resource Ltd ("Evores") provided technical IT support to the Department for Education. From August 2004 the Department was Evores' principal client. The original contract was to provide video conferencing, telecommunications and IT support services. A telephone service known as "MTS" was the principal aspect of the work carried out. However in 2009 the Department transferred most of its telephones to a VOiP system and as a result the need for telephone support reduced dramatically. Due to changing contract specification and the numbers of staff working in the Department, work further diminished. In 2007 six Evores employees were assigned to the activities concerned, in April 2008 four, August 2008 three, in September 2008 two and by July 2010 only one person, the claimant remained assigned to the contract. The claimant gave evidence that by July 2010 he had "very little work to do".

It was the Department's position that whilst the type of work performed by Evores remained, broadly, the same, the amount of work required to be carried out had reduced considerably. At the end of the contract the Department had concluded that the work amounted to a fraction (25% or less) of what would be expected for a full time employee to perform. When the contract was terminated, the Department took the view that TUPE did not apply. The employment tribunal focused on the activities that were being carried out when the contract came to an end and concluded, that following the termination of the contract the same activities continued to be carried out by the Department directly. It rejected the submission made by the Department that the quantity of work was so diminished so as to render the activities continued by the Department fundamentally different from the activities of Evores. Accordingly, the tribunal found that there had been a TUPE transfer and when the Department refused to employ the claimant he was automatically unfairly dismissed.

The Employment Appeal Tribunal reversed the employment tribunal and remitted the case to a differently constituted employment tribunal for re-hearing. The EAT (Lady Smith presiding) confirmed that the first question for the employment tribunal is to identify the relevant activities and then ask whether the activities carried out by the putative transferee immediately after the transfer are essentially or fundamentally the same as those which the organised grouping, employed by the alleged transferor, required to be carried out immediately before it. But, said the EAT "…it cannot be a matter of simply asking whether activities carrying the same label continue after the alleged transfer. In the factual assessment which the tribunal requires to carry out, it seems plain that they must consider not only the character and types of activities carried out but also quantity. A substantial change in the amount of the particular activity that the client requires could, we consider, show that the post transfer activity is not the same as it was pre-transfer".

Further, the EAT said, the assessment of the effect of a change in the quantity of the relevant activity is important for another reason. That is because the tribunal has to be satisfied that immediately prior to the transfer the organised grouping of employees had that activity as its "principal purpose". In the opinion of the EAT, a reduction in the amount of a particular type of work could meant that the group had, prior to the transfer, reached the stage where carrying out the relevant activity was no longer its principal purpose.

The employment tribunal had not considered these issues and had, thereby, fallen into error.

In our view this poses another problem for employees asserting a transfer of their

employment rights pursuant to a service provision change. What is, for example to stop a putative transferee gradually diminishing the workload required under the contract prior to its end, salami slicing it so that there is very little, in terms of quantity at the end of the life of the contract compared with before. The EAT rejected the argument that there was a risk of subversion. Termination of the contract for the provision of services is not a pre-requisite to the application of the service provision change rules. A relevant transfer could occur whenever the client contract activities cease to be carried out by the contractor's employees and are carried out instead by the client on its own behalf. If that happened at a date prior to the end of the contract there could be a TUPE transfer at that point and the relevant employees can look to Regulations for protection at that stage. With respect, in practice, employees are unlikely to be able to pinpoint a de facto service provision change prior to the end of the contract for services and, under the EAT's hypothesis in *Huke,* employees whose work has diminished by the time the contract comes to an end may be severely disadvantaged in terms of TUPE protection.

7: On a service provision change under TUPE does the client for whom the activities are carried out have to remain the same?

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Yes, said the Court of Appeal in *McCarrick v Hunter* [2012] EWCA Civ 1399

Mr McCarrick was employed in the provision of property services to a property company, the managing director of which was a Mr Hunter. However the lender on the properties appointed Law of Property Act Receivers who thereafter assumed control of the properties and appointed a new property services company, King Sturge. Mr McCarrick did not become employed by King Sturge but by Mr Hunter directly. He carried out property management services assisting King Sturge. Mr McCarrick was then dismissed by Mr Hunter and he brought a claim for unfair dismissal. To do so, however, he had to show his employment was continuous between his respective employers.

He argued there was a service provision change under Regulation 3(1) (b) of TUPE. The employment tribunal upheld his claim. But the EAT reversed this. Regulation 3(1) (b) (ii) of TUPE provides that a service provision change occurs where activities cease to be carried out on a client's behalf and are, instead, carried out by a subsequent contractor on the client's behalf. That, said the EAT, had to be read as meaning the same client. Here the properties had changed hands and the client was not the same.

The Court of Appeal agreed. Although Counsel for Mr McCarrick argued that a purposive approach ought to be applied to Regulation 3(1) (b), Elias LJ considered that there was no basis for giving the language of Regulation 3(1) (b) an artificial or expanded meaning. This was domestic legislation and was not giving effect to EU law.

Elias L J did not rule out a purposive interpretation for some aspects of service provision change. For example, it might be necessary "not to be too pedantic" with respect to the question of whether the activities carried on before or after an SPC are sufficiently similar. Likewise, a broad approach could be taken to the question of whether an employee is employed in the service transferred. But there was no room for a purposive construction with respect to the scope itself of Regulation 3(1) (b).

8: In a TUPE transfer, does a settlement agreement with one employer automatically bar off claims against other actual or potential Respondents?

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No, said the Employment Appeal Tribunal in *Tamang v ACT Security Limited*

When there is a TUPE transfer, there is often more than one employer in the frame. This is particularly acute in service provision changes and in cases under TUPE regulations 13-16 (information and consultation) where, in the latter case, there is potential joint and several liability among the employers.

On a service provision change concerning a security contract, an ACAS settlement agreement releasing claims was entered into with the original employer, Reliance (now Securitas). But this did not include two other potential parties, ACT Security Ltd and Euro Storage UK Ltd. When the employees decided to prosecute claims against these other parties, were they prevented from doing so by the original compromise agreement?

The employment tribunal said they could not sue. It considered the agreement with Reliance was a release of all three tortfeasors (relying on Chitty on Contracts to the effect that a release by one debtor releases the others).

The EAT held this was wrong. On the true construction of the agreement this was a covenant not to sue Reliance, and not a release of all Respondents. Its scope only related to Reliance and not by implication to others.

This shows how important it is for all potential parties in a TUPE transfer to be signed up to a settlement agreement if finality is required.

9: Does the "band of reasonable responses" test in unfair dismissal have to be modified where an employee's rights under Article 8 of the European Convention on Human Rights are engaged as a consequence of the dismissal?

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No, said the Court of Appeal in *Turner v East Midlands Trains*

This case concerned the dismissal of a train conductor for alleged ticket irregularities. The employment tribunal applied the "band of reasonable responses" test to both the fairness of the employer's investigation, and its ultimate decision to dismiss for the purposes of section 98 (4) of the ERA 1996 and found the dismissal fair.

The question was whether the tribunal was right to do so if Article 8 of the ECHR (right to respect for private and family life) were engaged. The tribunal found that Article 8 was not in fact engaged. But even if it were, and section 98 (4) had to be read compatibly with Article 8 (in accordance with Section 3 of the Human Rights Act 1998), the tribunal considered that (applying *X v Y* [2004] ICR 1634) the "band of reasonable responses" test is in itself compatible with Article 8.

On appeal to the Court of Appeal the claimant pursued the argument that Article 8 was engaged and therefore the employer's investigation did not satisfy the alleged stricter

procedural requirements which the proper protection of Article 8 rights requires. The employer argued that the claimant could not argue that her Article 8 rights had been infringed when she had brought the consequences on herself. That question could not be answered, said the Court of Appeal, until the fairness of the procedures and the proportionality of the sanction have been determined.

However, the "band of reasonable responses" test which, according to the case law such as *A v B* [2003] IRLR 405, requires a heightened standard to be adopted where the consequences of dismissal are particularly grave, adequately satisfies any Article 8 requirements as to procedure and thereby secures the benefit of the Convention right.

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