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Employment Law BULLETIN

Welcome to our December employment law bulletin.

In this issue we cover the long-awaited Supreme Court decision in *X v Mid-Sussex Citizens Advice Bureau and Others* concerning the legal status of volunteers and whether, in particular, a volunteer is covered by equality law.

The Supreme Court's decision that a volunteer cannot gain the protection of equality law, because he or she will not be "in employment" within the meaning of the legislation, will be a relief to all charities and not-for-profit organisations.

We also note some interesting EAT decisions on compromise agreements, TUPE and the "band of reasonable responses" test in unfair dismissal as well as the latest employment law news.

Seasonal greetings to our readers and best wishes for 2013.

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

Interview Skills
· A practical HR workshop, 6th January 2013

TUPE: The latest developments in law and practice
· Breakfast Seminar, 12th February 2013

and in conjunction with ACAS in the North East:

Understanding TUPE: A practical guide to business transfers and outsourcing
· Full Day Practical Workshop, 6th March 2013

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Click on any of the headings below to read more

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

1: Employment tribunal award limits increase from 1 February 2013

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By virtue of the Employment Rights (Increase of Limits) Order 2012 (SI 2012/3007), the maximum compensatory award for unfair dismissal will rise from £72,300 to £74,200 and the maximum amount of a week's pay, used to calculate statutory redundancy pay, among other things, will rise from £430 to £450.

2: Consultation Period for larger redundancies to be cut from 90 to 45 days

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The Department for Business, Innovation and Skills has announced that the government intends to cut the period of consultation which employers have to undertake before making large scale redundancies (100 or more) from 90 to 45 days. BIS also announced plans to exclude fixed term contracts from collective redundancy consultation where fixed term contracts reach the end of their "natural life".

The planned changes are to come into force from April 2013.

3: The Chancellor's Autumn Statement (1) TUPE

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Notwithstanding the measured government response to its call for evidence on the effectiveness of the TUPE regulations (see our October *Bulletin*), buried deep in the text of the Chancellor's Autumn statement (at p77) is a statement that the government will shortly launch a consultation on TUPE, including proposals to "remove unnecessary burdens on business".

4: The Chancellor's Autumn Statement (2) The Nuttall Review of Employee Ownership

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According to the Chancellor, HM Treasury and HMRC will work with the Department for Business Innovation and Skills to implement the government's response to the *Nuttall Review of Employee Ownership*, including contributing to the development of "off the shelf" templates and toolkits. The government will further report on this in the 2013 Budget.

5: The Supreme Court decides that a volunteer with no contract is not protected by discrimination law

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In *X v Mid-Sussex Citizens Advice Bureau and Others* the Supreme Court upheld the Court of Appeal's decision that a Citizens Advice Bureau volunteer who had no contract, was not covered by the Disability Discrimination Act 1995 or the Equal Treatment Framework Directive (2000/78/EC).

The volunteer was not "in employment" within the definition of the Disability Discrimination Act. Nor was it the intention of the draftsman of the Framework Directive to provide protection to volunteers in this position. The Court declined to make a reference to the European Court as it believed its interpretation of the Framework Directive was "not open to reasonable doubt".

In this case X worked with the CAB for 4-5 hours per week. She signed a "volunteer agreement" which stated that it was "binding in honour only… and not a contract of employment or legally binding". When she was asked to cease her volunteering work she sought to bring a claim under the Disability Discrimination Act. The employment tribunal, the EAT and the Court of Appeal rejected her claims on the basis that she had not been in employment within the meaning of section 68 of the Act. The Supreme Court

was unanimous in dismissing the appeal. The following were the grounds:

- X did not have protection under the legislation because she did not have a *contract* with the CAB as required by the definition of "in employment".
- Nor was she a protected office holder
- The Framework Directive is not unlimited in its scope and extent and it is carefully defined and protects against discrimination only in specified circumstances
- If X's contentions had been correct and some, but not all, were covered by the Framework Directive: "the Directive would surely have given some indication as to where the line should be drawn".
- It was clear from the legislative history of the Framework Directive that it was not intended that Article 3(1)(a) of the Directive should encompass voluntary work
- The European Commission continually reviews the implementation of the Directive by Member states and has never suggested that the apparent absence of protection for volunteers in the implementing legislation of the UK or other member states amounts to a failure properly to implement the Directive.

This reasoning, which applies to the Equality Act 2010, will be a great relief to charities. The CAB's defence of the claim was supported by ACEVO, Groundwork UK and Volunteering England on the basis that a finding in favour of X " would undermine the nature of volunteering, create practical barriers and additional costs for charities and organisations in which volunteering occurs".

On the other hand, the Court appeared to accept that some volunteers may have protection, noting that "volunteers also come in many forms, including the cheerful guide at the London Olympics, the charity shop attendant, the intern hoping to learn and impress and the present appellant who provided specialist legal services. The intern might well fall within Article 3(1)(b) but….the appellant did not".

6: Can an employer withdraw a conditional benefit under a compromise agreement when the employee is in breach of his undertakings?

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Yes, said the High Court, on the facts in *Imam-Sadeque v BlueBay Asset Management*

Mr Imam-Sadeque (I-S) was a highly paid and senior investment manager. He wanted to leave his employer. If he resigned, he would be a “Bad Leaver” for the purposes of a share option scheme. However he entered into a compromise agreement which would deem him to be a “Good Leaver”, and allow him to exercise share options worth £1.7 million. But this benefit was conditional on compliance by the employee with promises not to compete or solicit BlueBay’s employees.

The employee broke these terms by secretly setting up in competition and poaching an employee. The employer withdrew the benefit on account of these actions

The High Court held that BlueBay was entitled to do this on account of I-S’s repudiatory breach of the agreement, and the shares were forfeited.

Nor was the condition a penalty. All the agreement did was to confer rights on I-S which he would not otherwise have had. The agreement conferred a conditional benefit which

simply never accrued because the employee failed to fulfil the condition, namely performance of the agreement on his part. Furthermore this was an agreement struck between sophisticated parties of comparable bargaining power.

In the words of Popplewell J, It would be an “injustice” to BlueBay if the employee could escape his bargain.

7: The "band of reasonable responses" test is alive and well

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In *SPS Technologies Limited v Chughtai* the claimant was a long-serving laboratory controller. His principal task was to ensure that the results of various tests conducted on a variety of aircraft parts had been processed to the appropriate standard. The company's code of conduct emphasised the principle that there could be no compromise on safety standards. All records had to be 100% accurate. Its disciplinary policy included, as an example of gross misconduct, falsification of company records.

As a result of a whistle-blowing complaint the Claimant was named as a person involved in the fabrication of stress durability test results. How important this complaint was received is evidenced by the fact that the Vice President of Quality and Continuous Improvement promptly boarded a flight to the UK from the United States along with a specialist metallurgist employed by the company. An investigation ensued, analysing some 12,000 records with 19 employees interviewed.

During a final interview the Claimant frankly admitted falsifying records but he contended that he did so with the knowledge and approval of his line manager. He was suspended and ultimately dismissed. After a full investigation the employer concluded that they were unable to find that the line manager was engaged in and/or the falsification of test data and therefore the Claimant alone was dismissed. The majority of the employment tribunal disagreed with the investigation and considered that more scrutiny should have been undertaken with regard to the line manager and it was unfair to dismiss the Claimant alone. The minority (the Employment Judge) disagreed.

The EAT reversed the employment tribunal, agreeing with the Employment Judge. What the majority had done was to substitute their own view for that of the employer, which, under the band of reasonable responses test was an impermissible option. It is not the function of the employment tribunal to substitute its own view for that of the employer and it could not be said that the dismissal of the employee for admitting misconduct was unfair.

8: Service provision change and diminished activities following transfer - does TUPE apply?

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In our November *Bulletin* we reported the case of *Department for Education v (1) Huke (2) Evolution Resource Ltd (in liquidation)* (EAT/0080/12) in which the EAT considered that, in considering whether the activities carried on before a service provision change were fundamentally the same as the activities carried on afterwards (which is a condition of a service provision change TUPE transfer) regard should be had to not just the *character* of the activities but also the *quantity* of activities. So that if there has been a

substantial change in the amount of the particular activity that the client requires for the future, that could show that the post transfer activity was not the same as it was pre-transfer, and in which case, TUPE would not apply.

Since then, another division of the EAT has come to a different view. In *London Borough of Islington v Bannon* Islington Council had a statutory duty under the Children Act 1989 to provide independent visitors for children. This was outsourced to CSV. It was proposed to award this contract to a new provider, Action for Children, but it fell though. Islington had to do something in order to perform its statutory duty and so it intervened. It did not have the resource to carry out a full service. It therefore carried out a reduced service on a "spot basis". It was argued by Islington that this intervention on a reduced activity basis was not a service provision change. As the learned judge put the question: "Does [the Council's] imperfect performance of that [statutory] duty mean there was no service provision change?" It was common ground that the service "landed on Islington's doorstep at short notice". Clearly it did the *minimum* to discharge its statutory duty. But this reduction in activity *did not* prevent a service provision change transfer. Thus, for example:

"When a canteen changes hands, the work may decline because people may not want to go to the new provider; it does not change the character of the service being provided just because on accepting the change not all of the activities can be carried out".

It seems to us that this is a more sensible interpretation of the service provision change rules under TUPE.

9: New Disclosure and Barring Service

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On 3 December 2012 the Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012 came into force, which merges the Criminal Records Bureau and Independent Safeguarding Authority to form the Disclosure and Barring Service, a non-departmental public body, sponsored by the Home Office.

The merger has resulted in the following changes to terminology:

- A standard CRB check has become a standard DBS check.
- An enhanced CRB check has become an enhanced DBS check.

An enhanced CRB check with Barred List check has become an enhanced check for regulated activity.

10: Can an employer refuse to be dictated to about whom to employ without breaking trade union membership discrimination laws?

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Yes, said the EAT, on the facts of *Miller v Interserve Industrial Services Ltd*

In this case the employer provided labour for "shut-down" projects at oil depots. The business was highly unionised. A full time trade union official from UNITE pressured the

employer to recruit 3 named employees with a view to their acting as shop stewards. By all accounts the full time official's approach annoyed the employer who regarded the union official as having a combative manner. As a result the employer declined to recruit the individuals concerned.

The employment tribunal found that, as a fact, this was because he resented being bullied by the union and he did not wish to be dictated to about whom to employ. Because of this motivation the employer had not refused to employ the employees because of their trade union membership contrary to section 137(1) of TULRe(C) A 1992.

The EAT agreed. The employees were simply caught in the "crossfire" between the employer's manager and the union official. Their non-recruitment did not relate to their trade union membership.

However, the EAT said, the outcome of this kind of case will depend entirely on the assessment of the evidence in each particular case. The EAT would expect this kind of employer's explanation to be scrutinised narrowly. But on this occasion the employer passed the test.

11: Government response to Consultation on "Employee Owner ("Employee Shareholder") status

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The government has published its response to a Consultation Paper on the Chancellor's proposal for a new employment status, "employee owner". To obtain this status, individuals would give up some employment rights in exchange for capital gains tax exempt shares in their employer. The Growth and Infrastructure Bill will introduce the new status and is currently being considered in committee. The government has tabled amendments to the bill reflecting aspects of its response to the consultation.

Respondents to the consultation included only a "very small number" who welcomed the proposed new status and anticipated using it. Nevertheless, the government will proceed with the legislation.

The government plans to reorganise its guidance on employee, worker and employee owner status, to assist businesses to use these appropriately. There will be new guidance for individuals about the personal consequences of employee owner status, and guidance for businesses about its implementation, including guidance on valuation and forfeiture of shares.

The government also plans to change "employee owner" to "employee shareholder", which is felt to be a better description of the status.

Other aspects of the government response include:

- Requiring employee owner shares to be fully paid up, and that individuals must give no consideration for them other than agreeing to be employee owners.
- Allowing non UK-registered companies to use employee owner status. It will also be possible to issue parent company shares to employee owners, rather than employer shares, where the employer is a subsidiary.
- Removing the upper limit (£50,000) on the value of employee owner shares,

although this value will be retained as an upper limit (as at the time of acquisition) on the value of shares qualifying for the CGT relief.
- Requiring employee owners to give 16 weeks notice of return from additional paternity leave rather than 6.

12: The Internships (Advertising and Regulation) Bill 2012-13

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The position of unpaid interns has received much attention in the press.

A Private Members Bill was introduced by Hazel Blears on 5 December 2012. The Bill would prohibit the advertising of long-term unpaid internships and regulate the conditions of employment for paid internships.

The Bill was introduced under the Ten Minute Rule, which allows an employee to make the case for a new bill in a speech lasting for up to 10 minutes. An opposing speech may also be made before the House decides whether or not the Bill should be introduced. If the MP is successful the Bill is taken to have had its first reading. It was agreed that the Bill would be second read, and that is due to occur on 1 February 2013.

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