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MARCH 2013

Employment Law BULLETIN

Welcome to our March employment law bulletin.

We report the news that the House of Lords has rejected clause 27 of the Growth and Infrastructure Bill, which would have created the concept of employee shareholder contracts in return for giving up employment protection rights.

We note cases from the EAT on disability and race discrimination, and on TUPE. We include the timetable for projected employment law changes this year. We also comment on a major piece of research undertaken for the Department for Business, Innovation and Skills about employers' perception of employment law.

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

Handling Redundancy
· Breakfast Seminar, 9th April 2013

Employment Law Update for Charities
· Full Day Seminar, 6th June 2013

and in conjunction with ACAS in the North East:

Understanding TUPE: A practical guide to business transfers and outsourcing
· Full Day Practical Workshop, 12th April 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: The House of Lords throw out the idea of “employee shareholder” contracts

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March 20 was not an auspicious day for the Chancellor of the Exchequer, George Osborne, who confidently, on budget day, developed further his idea of the employee shareholder (shares in the company to be given in return for giving up basic employment rights). He formulated a new tax break and announced that the scheme would definitely come in on 1 September 2013.

But on the same day, the House of Lords voted (by 232 to 178) to remove clause 27 of the Growth and Infrastructure Bill (the provision in the Bill which would have introduced the concept of employee shareholder contracts). Employee shareholder contracts are an idea, which has been met with no enthusiasm. Their Lordships were scathing. It was perhaps best summed up by the speech of Lord Pannick (a distinguished QC) when he pointed out four main objections to clause 27.

The first was that employment protection is an essential check and balance in the employment relationship because of the inequality of bargaining power between the employer and the employee. It should not be allowed to be traded like a commodity.

The second objection concerned the jobseeker. Under clause 27, an employer would have been able to refuse to offer employment to jobseekers who declined to enter into a clause 27 agreement: “The worse the job market, the greater the employee’s need for the basic protections against unfair dismissal and redundancy”.

Thirdly, he said, the provision would be positively damaging to industrial harmony and would not be used by any sensible employer.

Fourth, and finally, the employee and the prospective employee would not be given the minimum necessarily protection to understand what they are being asked to give up. The Government had refused to accept that statutory rights should only be lost if the agreement was in writing and the individual had received legal advice. This, in their Lordships' view, was not acceptable.

The Bill will return to the House of Commons for the Government to decide whether it should persist and attempt to reintroduce the clause.

To read the interesting debate in the House of Lords click *here*

2: New Employment Tribunal Rules

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On 14 March 2003 the government published its response to the consultation on Lord Justice Underhill's proposals to reform the Employment Tribunals rules of procedure. These recommendations have largely been accepted. A revised draft of the rules will be published and laid before Parliament in May 2013 they are now intended to come into force in Summer 2013, as opposed to April, as was originally intended (see below). Employment tribunal fees will come in at the same time (see below).

3: TUPE: Pre transfer dismissal was not for an ETO reason

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In *Kavanagh v Crystal Palace FC Ltd* Crystal FC (2000) Ltd and Selhurst Park Ltd went into administration. The football club was put up for sale as a going concern. The sale was secured, not completed, due to legal difficulties. By this stage the club was in a parlous funding position. The administrator decided to "mothball" the club over the close season when no matches would be played in the hope that it might be possible to sell the club at a future date. He asked a director to produce a list of employees that could be made redundant and still permit the core operations of the club to continue during the close season. Dismissal letters were given to 29 staff on 28 May 2010. Press statements were issued on behalf of the club indicating the perilous financial position of the club and the urgency of completion of agreement for the sale of the stadium. By 7 June the sale of the club to a consortium had been agreed subject to the transfer of the Football League share. The Football League share was transferred on 19 August 2010 when the sale was completed.

The employees claimed that their dismissals were connected with the transfer and were automatically unfair because they were not for a reason that was an economic, technical or organisational reason entailing changes in the workforce and that such liability transferred to the transferee. The administrator argued that he could simply no longer afford to pay all of the club's employees and had to reduce the workforce and the wage bill and had to mothball the club until a purchaser could be found. The claimants, on the other hand, argued the true reason for the dismissals was to reduce the wage bill to make the purchase of the club more attractive to the purchasing consortium

The employment tribunal found that there was no evidence of collusion between the administrator and the purchaser. The ostensible reason put forward by the administrator

was a genuine one, in order to keep the club alive as a going concern in the hope that there would be a sale in the future. The tribunal found that the reason for dismissal was connected with the transfer found that it was an economic technical or organisational reason entailing changes in the workforce.

The EAT overturned this conclusion. Interpreting the leading case of *Spaceright Europe Ltd v Baillavoine* [2011] EWCA Civ 1565 the EAT considered that it was not the case that an administrator could never dismiss for an ETO reason. Where he intended to carry on the business, plainly he could. However, to be distinguished (as in the present case), was the case where the dismissal was part and parcel of a process with the purpose of selling the business. Here the ETO reason could not apply. In *Baillavoine,* said the EAT, there was a very clear distinction drawn between a dismissal for the purpose of continuing to run the business and a dismissal that is for the purpose of selling it, and from the findings of fact made by the tribunal, the only permissible conclusion that could be drawn was that the dismissal was for the purpose of selling the business, albeit was not at that stage it was not certain if there would be a sale, nor, necessarily, to whom.

4: An obese employee was considered disabled for the purposes of the Equality Act 2010

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The EAT, in *Walker v Sita information Networking Computing Ltd* has held that an obese employee who suffered from a number of physical and mental conditions was disabled under the Disability Discrimination Act 1995 (see now the Equality Act 2010). An employment judge had at first instance rejected the employee's claim. But the judge had wrongly focused on the fact that he could not identify a cause for the claimant's impairments. He should instead have focused on the effect of those impairments.

Of course obesity is not *in itself* an impairment for disability discrimination purposes. But obesity might make it more likely that an employee has impairments within the meaning of the legislation.

6: Timetable for new Employment Laws

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The department for Business Innovation and Skills (BIS) has published its Employment Law 2013: Progress on Reform, March 2013.

The following is a summary.

Delivered to date

The following have been delivered to date

- 2 year unfair dismissal qualifying period
- Removal of default retirement age
- Revised immigration checks
- Rewriting of guidances
- Employers' charter
- Tribunal award information published

Spring 2013

The following measures will be introduced in April

- Consolidation of the National Minimum Wage Regulations
- Changes to collective redundancy consultation obligations
- The ACAS guide on collective redundancy information and consultation obligations
- Consultation on the recruitment sector

Summer 2013

The following reforms seem likely to come in during the course of the summer

- Settlement Agreements – revised rules
- 12 months pay cap on unfair dismissal compensatory award
- Revised Employment Tribunal rules
- Whistle Blowing changes
- New Tribunal fees
- A review of agency workers paperwork requirements
- Portable online DBS (previously CRB) checks

Autumn 2013

The following are scheduled to take place in the autumn

- New employee shareholder employment status (but see our lead news story)
- TUPE reforms
- Call for evidence on the Public Interest Disclosure Act
- Online tool for employing staff for the first time
- Interactive guidance on discipline

Spring 2014

Looking ahead there will, next year be

- Right to request flexible working for all employees
- The introduction of ACAS early conciliation
- New sickness absence management rules
- Introduction of Employment Tribunal penalties
- Evaluation for workplace mediation services

Looking beyond

In 2015 there will be

- The introduction of shared parental leave

Implementation of the Posting of Workers Enforcement Directive

7: The vulnerability of a migrant worker can be disassociated from race

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In *Taiwo v Olaigbe and another* the Claimant was a Nigerian woman employed by the Respondents between February 2010 and January 2011 as a domestic worker on a migrant domestic worker visa. During the time of her employment the Claimant had been treated very badly by her employers and she sought the help of North Kensington Law Centre in bringing a claim of constructive dismissal and direct, or alternatively, indirect, race discrimination.

The Claimant was successful in claiming constructive dismissal in the employment tribunal, which also found that her basic employment rights under both the National Minimum Wages Act 1998 and the Working Time Regulations 1998 had been breached. However, it found that the Claimant had not shown a prima facie case for direct or indirect discrimination.

A claim of indirect discrimination had not been clearly identified and this claim was dismissed.

The Claimant appealed on her claim of direct and indirect discrimination.

The EAT upheld the decision of the tribunal and held that, on the facts, unfavourable treatment of the Claimant did not constitute direct or indirect discrimination.

In considering the claim of indirect discrimination the EAT did not understand how the claimant's relative disadvantage could be considered without a relevant "provision criterion or practice" (PCP) (against which the worker might be disadvantaged) being identified:

"Relative disadvantage is not a question to be addressed at large. Who is disadvantaged, to what extent, by comparison with whom, and by what all must be answered…the relative PCP must be identified".

The Claimant argued that the PCP was "the treatment of the claimant as a migrant worker". The EAT held that the mere assertion of vulnerability as a migrant worker was not a PCP.

On the direct discrimination point, the evidence had to show that the Claimant was treated less favourably than a domestic worker of British origin and that this less favourable treatment was because she was Nigerian. The EAT found that there was no evidence and no inference could be made that the Respondents would have treated the Claimant differently had she not been Nigerian. It held that the Claimant's treatment was related to her vulnerability, due to her lack of English and her dependence on her employer for her right to stay in the UK resulting from her migrant worker status. The EAT dismissed the appeal on this basis.

A migrant domestic worker can be a vulnerable individual for many reasons but this vulnerability is not inextricably linked to his or her race.

8: Revised guidance on pension obligations following a TUPE transfer

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The Department for Work and Pensions has issued a Consultation document on revision of the rules concerning a new employer's pension obligations following a TUPE transfer.

These are currently contained in the Transfer of Employment (Pension Protection) Regulations 2005. The main thrust of the 2005 Regulations is, notwithstanding the exclusion of the automatic transfer of occupational pension rights under Regulation 10 of TUPE, to require a new employer to allow an employee to become an active member of an occupational pension scheme (although not the same scheme as with the transferor).

If the transferee offers a defined benefit scheme it must satisfy the reference scheme test provided for in the Pension Schemes Act 1993 or alternatively the value of benefits should be at least 6% of pensionable pay for each year of employment in addition to any employee contributions.

For a money purchase or stakeholder scheme, the transferee is required to make employer contributions matching those chosen by the employee to an upper limit of 6% basic pay.

But in July 2012 automatic enrolment came in. From July 2012 to September 2017 the minimum contribution will be 2% of earnings increasing to 5% for the period between October 2017 and September 2018. There is a missmatch between the automatic enrolment rules and the 2005 Regulations. In other words, a transferor employer who has just automatically enrolled employees may contribute a relatively small percentage of employee's pay towards the pension whereas, if, by happenstance, the business is transferred the employee can chose, with a new employer a contribution of up to 6%.

The amendment, which will be via the proposed transfer of the Employment (Pension Protection) (Amendment) Regulations 2013 will provide that the transferee will be able to satisfy the "relevant contribution" provisions of the 2005 Regulations by matching the contributions paid by the transferor immediately prior to the transfer as an alternative to matching the level of contributions chosen by the employee. It will, as before, be open for the transferee to decide what kind of scheme it puts in to meet its pension protection obligations.

9: Employer Perceptions of Employment Law

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The Department for Business Innovation & Skills (BIS) has published a new report in its Employment Relations Research series*: Employer Perceptions and the Impact of Employment Regulation.*

This report was carried out on behalf of BIS by researchers from TNS/BMRB and Kingston University. A total of 40 businesses took part and were interviewed over the spring and summer of 2012.

The report makes very interesting reading. Contradicting the Coalition government's thinking on the impact of employment law on business via its "Red Tape Challenge" and *Employment Law Review*, respondees generally considered that employment regulation was both *necessary* and *fair*. In the main, anxiety about employment law stemmed from a fear and misunderstanding of the law. This is the so-called "perception reality gap",

identified by other researchers such as Peck and others in *Business Perceptions of Regulatory Burden* (2012)

The key points in the report are as follows:

- Employers were often supportive of a regulatory framework for employment for the employment relationship.
- Reducing regulation for small employers might not actually be effective in reducing anxiety, because those employers are often unaware of the changing laws relating to employment.
- Employers have a fear of being taken to an employment tribunal over unfair dismissal, and some myths surrounding the dismissal process need to be dispelled.
- Tribunal outcomes were perceived as unpredictable
- Small employers tended not to formalise disciplinary procedures unless dismissal was being considered, a process, which often let to litigation.
- A solution to that problem would be for small businesses consistently to follow a procedure for dealing with performance and conduct. But these employers expressed a fear that this would damage the personal element of the employment relationship in a small business.
- The report identifies a clear need to provide a single information portal regarding employment law and HR.
- When looking at reforms to simplify employment law, the focus should be on disciplinary and dismissal procedures. An interesting finding was that, four years on, many employers still believed there was a statutory disciplinary and dismissal procedure that needed to be followed.

An insightful conclusion of the report is that employers' perception of legislation as burdensome is based more on an actual *fear* of litigation, rather than any actual *experience* and is actually *worsened* by the public pervasiveness of the "anti-regulation" debate.

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