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Employment Law BULLETIN

Welcome to our April employment law bulletin.

In this issue we cover the changes made to the rules on information and consultation on collective redundancies effective from 6 April 2013 and the new non-statutory ACAS Code of Practice on the subject.

We highlight changes on the horizon to criminal records checks.

In the EAT we report cases on unfair dismissal concerning conduct and redundancy selection and on sex discrimination and awards for injury to feelings. An interesting case in the employment tribunal illustrates that, following a TUPE transfer, an employee is not always entitled to object to new ways of working.

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

Handling Grievances
· HR Workshop, 7th May 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, 22nd July 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: New ACAS guide on collective redundancy consultation and changes to collective redundancy law

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On 6 April 2013 the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 made the following important changes:

- In redundancy exercises involving a 100 or more employees at one establishment the minimum consultation period before the first notice of dismissal has been reduced from 90 days to 45 days.
- Likewise the period for lodging a Form HR1 in such cases is reduced from 90 days to 45 days before the first dismissal takes effect.
- Employees on fixed term contracts "which will reach their agreed termination point" are excluded from collective (though not individual) redundancy consultation obligations.

Following on from these changes ACAS has now produced a *non-statutory* guidance which will explain how employers should handle a collective redundancy consultation and how to deal effectively with the most common contentious issues.

The guidance deals with a number of difficult issues in practice, such as the meaning of "establishment", advice on how to deal with cases in which TUPE also applies, and where the employer is potentially insolvent. It develops guidance on well-being and morale of employees involved in redundancy situations, including those who have to break the bad news (the teller) and there is also a sample redundancy selection criteria matrix and

redundancy procedure for agreement between employers and employee representatives. The guidance may be accessed here.

2: Criminal records checks: new rules on disclosure of cautions and convictions

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On 26 March 2013, the Home Office laid draft legislation before Parliament which, if passed, will relax the current criminal records checking system so that certain historic or minor offences and cautions will no longer be disclosed. These proposals are being put forward in response to the Court of Appeal's finding in *R (T and others) v Chief Constable of Greater Manchester and others* [2013] EWCA Civ 25, in which it was held that the blanket disclosure of all cautions and convictions, (a current requirement of the statutory system), was a disproportionate means of achieving the legitimate aim of protecting employers, and children and vulnerable adults in their care.

3: Shares for rights

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In our last Bulletin we reported that the House of Lords had voted to delete clause 27 of the Growth and Infrastructure Bill, which would introduce a new employee shareholder employment status and under which an existing employee or new recruit can agree to sacrifice certain employment rights in return for shares in the company.

Since then the Bill has been in "ping pong" between the House of Commons and the House of Lords. On 16 April 2013, the House of Commons voted to retain the clause, and on 22 April 2013 it was again rejected by the House of Lords.

In direct response to concerns raised by the Lords, the Minister of State for Business and Enterprise, Michael Fallon MP, sought to reassure jobseekers that the new employee status was entirely voluntary, and clause 27 was amended to remove any ambiguity on this point.

The government, in its determination to pursue the scheme, published the following concessions:

- a provision that the employee cannot accept the offer within seven days of it being made
- a written statement setting out the rights that the employee is giving up
- a written statement setting out the details of the shares being offered (including whether they are voting or non-voting shares, whether they carry a dividend, and whether they carry a right to a share in the company's assets if it is wound-up, whether pre-emption rights are excluded, and details of drag-along and tag-along rights)

Following yet another concession made on 24 April, the House of Lords has finally voted to accept the new employee shareholder status proposed. The government's final concession is that an employee's agreement to become an employee shareholder will not be valid unless s/he receives advice from a relevant independent advisor. The reasonable costs for obtaining that advice are to be met by the employer, whether or not the

employee ultimately accepts the role.

- The new scheme is likely to be implemented in autumn this year.

4: Dismissal of a manager for behaving in an over-authoritarian manner towards junior staff was unfair

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In *JJ Food Service Limited v Kefil* the EAT emphasised the need for warnings and the opportunity to improve before dismissing on ground of unacceptable managerial style. At the time of Mr Kefil's dismissal he was Stock Control Manager with 14 years service. Although he had no disciplinary record, he had been counselled about his management style in the past. In April 2011 a letter of complaint was written by three members of staff and signed by ten others. The complaint concerned Mr Kefil and also the Warehouse Manager. The complaints were essentially of mistreatment of employees beneath the managers. They were not tied to a specific date or time although there were some specific dates in respect of unfair treatment. The employer called a disciplinary hearing and proposed a demotion and reduction in salary but this was refused and Mr Kefil was dismissed on ground of misconduct. He claimed unfair dismissal.

The employment tribunal took into account that the employee had, at best, an informal warning on his record. At the time it was given, he received no management training for the purposes of remedying any perceived deficiencies. Furthermore the main focus of the letter of complaint was the Warehouse Manager and not Mr Kefil. Therefore the dismissal was outside the range of reasonable responses of a reasonable employer and unfair.

The employer appealed to the EAT, arguing that he decision of the employment tribunal was perverse. It argued that the employment tribunal had substituted its own view for that of the employer, which is not permissible. However, on appeal it was considered that there was nothing in the employment tribunal decision to show that the Tribunal had substitute its own decision for that of the employer.

Nor was the decision perverse. To argue perversity, an Appellant must show that the decision reached by the employment tribunal is wholly impermissible. As the EAT said: "various phrases have been used in different cases to describe the same result, from "flying in the face of reason" to "provoking astonished gasps from the amazed observe"". This was not such a case.

The employment tribunal was entitled to find that dismissal of a manager, who had previously received only an informal warning and who had been given no management training was, in these circumstances, outside the band of reasonable responses. As the EAT said: "Indeed, it might be said that the over-authoritarian manager is not unknown in industry and the lay members, in particular, made the point that it would be unfortunate if such managers were not warned, if the circumstances were such that they might not clearly have understood that repeat of that conduct might lead to their dismissal".

5: How should Tribunals approach injury to feelings and aggravated damages in discrimination cases?

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The principles were discussed by the EAT in *HM Land Registry & McGlue*

Mrs McGlue was on a career break following maternity leave, from which she could return at any time on short notice. In order to achieve reductions in head count and cost the employer set up a voluntary severance scheme. Mrs McGlue applied.

Management then unilaterally decided to exclude all those who were on a career break. This decision was not published and was not subject to consultation with employees or trade unions. Mrs McGlue was also misled into thinking that she still remained eligible for this scheme and that her application would be considered in due course. She was turned down. Her grievance took 7 months to resolve before it was dismissed.

She succeeded before the employment tribunal in her claim for indirect sex discrimination. She was awarded compensation which included injury to feelings at £12,000 and an aggravated award of a further £5,000.

The employer appealed, arguing, amongst other things, that the award for injury to feelings was too high. The EAT noted however that the award made was at the midpoint of the middle range on the *Vento* scale. Awards in respect of injury to feelings, said the EAT, were not susceptible of close calculation and would not be interfered with unless they were "manifestly excessive" or "wrong in principle". Here the tribunal had used its experience properly to assess the effect of the conduct on the Claimant.

However, in the opinion of the EAT, additional aggravated damages were not appropriate. They should be awarded, as a rule, if the act is done in an exceptionally upsetting way, or for a bad motive, or was aggravated by subsequent conduct, for example at trial. The EAT held that in this case the facts did not meet those conditions.

6: Using assessment centre competency tests as part of a redundancy selection process was unreasonable

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In the case of *Mental Health Care (UK) Ltd v Biluan & Anor* the question arose for the EAT was whether it is fair to carry out a redundancy selection exercise where employee capability is assessed entirely on an assessment centre technique.

The Appellant was an employer operating a small residential home/hospital for patients with mental health or learning disabilities. In late 2010 there was a redundancy exercise arising out of the closure of one of the wards. The decision was taken to treat the pool for redundancy as all the nursing and support staff at the hospital and staff were selected on the basis of a marked assessment by reference to three criteria: a competency assessment, disciplinary record, and sickness absence record.

None of the HR staff conducting the assessment had any experience of working with the individuals who were being assessed, no past performance appraisals had been considered, and no assessments from managers who had worked with the employees had been obtained. The methods of assessing competency were those used by the employer for the purposes of recruitment and employees were selected for redundancy strictly according to their scores.

The employment tribunal found that an assessment of the kind carried out was likely

unfairly to favour those employees who had an outgoing personality and that it would disadvantage those who were "retiring and thoughtful". The tribunal found that there had been "a total lack of proper consultation within the meaning set out by Lord Justice Glidewell in *R v British Coal Corporation*" and that the dismissals were unfair.

On appeal, the EAT (Underhill J) noted that, although not all the tribunal's particular criticisms seemed to be justified, it was nevertheless entitled to find that the way in which the criteria were applied was in some respects unsatisfactory. Whilst the EAT appreciated that the employer had taken a lot of trouble over the redundancy selection exercise and put a lot of resources into it, it found that the employer had chosen an involved HR-driven method which deprived it of the benefit of input from managers and others who knew the staff in question, and which, as such, was liable to be difficult to apply consistently. That method produced results which were acknowledged to be "very surprising" but which were persisted in because the processes were thought to be so "robust". The EAT was not surprised that the employment tribunal thought that a "blind faith" in process had led to the employer losing touch with common sense and fairness and it upheld the finding of unfair dismissal.

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7: TUPE: Different ways of working and new clientele were neither a constructive dismissal nor a substantial change in working conditions to the employee's material detriment

In *Donovan v (1) JD Services HVAC Limited (2) Forward Building Services Limited* (Case No. 1102114/2012, employment tribunal, unreported) the employee was employed as a mobile building services engineer. Forward Building Services Limited went into liquidation and JD Services HVAC Limited purchased maintenance contracts and the maintenance activity of Forward Building Services Limited. It was not disputed that this was a TUPE transfer.

But over a period of 6 months Mr Donovan perceived his ways of working and the clients he was expected to deal with had changed. Although the basic nature of the work was similar, JD Services adopted different methods of working. There was new paperwork for the engineers to complete. Mr Donovan was expected to carry out more risk assessments than previously had been the case. He was asked to obtain prices for replacement parts, a task which had been done by his old employer's administration department. Previously he had gone in to his old employer's offices to obtain details of jobs allocated to him. Now engineers received mobile phones and their normal method of allocating jobs was to send them via email or sometimes by post. With his old employer Mr Donovan had frequently finished earlier than his contracted hours and the hours not worked had been deducted from his pay. Once he moved, his average working day was 7.26 hours and travel time 1.4 hours.

Not all of the clients of the business moved over. So he was allocated other work, broadly in the same area of operation, but it involved more driving. The work was centred more in London which meant that journey times were longer because of congestion and there were difficulties in relation to parking, particularly in the West End of London. Mr Donovan did not like working in any part of London and particularly the West End because of travel and parking difficulties. The types of jobs were different. The old employer's work had been in offices, care homes and warehouses but those of the new employer were in restaurants, pubs and clubs. Mr Donovan found the different procedures, paperwork and

work load ‘a huge learning curve’ and he felt he was under pressure. Although previously he was obliged to undertake overtime when required, the new employer had an expectation that employees would be available to work on Saturdays on a more regular basis. Finally, there was an expectation that employees would be on call on a more regular basis and there was a specific contractual payment of £500 for being on call.

It was held by the employment tribunal that the work that Mr Donovan was now being required to do and the working methods that the new employer adopted were all within the terms of his former contract of employment with his old employer. The method of working was different, the nature of businesses of some clients were different, and he was required to work more intensively as the working methods of the new employer were more efficient. But the work was essentially the same and did not amount to a breach of contract as it all came within the ambit of a service engineer’s responsibility. The Claimant was therefore not constructively dismissed for the purposes of Section 95(1)(c) of the Employment Rights Act 1996 (see TUPE, Regulation 4(11)).

The final question was whether there was, instead, a substantial change in his *working conditions* to his material detriment (TUPE 4(9)). In the tribunal’s view the only aspect which might have involved in a substantial change in working conditions to his material detriment was the more formalised requirement to be available for Saturday working for 2 days a month. The tribunal concluded that this change was not a change of substance. The new employer was simply trying to put the issue of Saturday working on a more organised basis. Overall the work remained the same but it was to be done in a more efficient and organised way and involved different clients. This was not a “substantial” change in working conditions.

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