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MAY 2013

Employment Law BULLETIN

Welcome to our May employment law bulletin.

In this issue we report on the conclusion of the Enterprise and Regulatory Reform Bill through its parliamentary journey, finally achieving the Royal Assent. We note the first commencement dates of the new provisions. Also, although there is little meat in the Queen's Speech by way of employment law, some proposals may have an impact, and we draw attention to the most significant.

There are EAT cases on deductions from wages, TUPE consultation and "some other substantial reason" dismissals, and we also report an interesting employment tribunal case on victimisation of an employee for bringing sex discrimination proceedings against a previous employer.

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

Employment Law Update for Charities
· All Day Annual Seminar, Royal York Hotel, 6th June 2013

Handling Employment Disputes: The New Rules
· Breakfast Seminar, 6th August 2013

and in conjunction with ACAS in the West Midlands:

Slaying the Dragon, simplifying TUPE in a day
· A Full Day Conference, 18th June 2013

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Click on any of the headings below to read more

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1: Enterprise and Regulatory Reform Act 2013

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After a long passage through Parliament, the Enterprise and Regulatory Reform Bill received Royal Assent on 25 April 2013.

On 2 May 2013 the final version of the Enterprise and Regulatory Reform Act 2013 was published. Section 10, which prohibits ACAS from disclosing information relating to a worker, employer or trade union held by ACAS in connection with the provision of ACAS services, and section 98, under which the government can legislate to give tribunals the power to order an equal pay audit, came into force on 25 April 20113.

The following sections will come into force on 25 June 2013:

- EAT judges will sit alone (*section 12*).
- The qualifying period for unfair dismissal will not apply where the main reason for dismissal is the employee's political opinions or affiliation (*section 13*).
- The power to vary the unfair dismissal compensatory award (*section 15*).
- Changes to whistleblowing legislation, such as the introduction of a public interest requirement and the removal of the good faith requirement (*sections 17, 18 and 20*).
- Introduction of tribunal powers to make deposit orders in relation to claims or responses, and award both costs and expense to litigants in person (*sections 21*).
- The introduction to tribunal powers to make deposit orders in relation to claims or responses, and award both costs and expenses to litigants in person (*section 21*).
- Changes to the way in which increases to the limit on a week's pay is calculated (*section 22*).
- The curbing of the EHRC's remit (*section 64*).
- The abolition of the Agricultural Wages Board for England and Wales (*section 72*) (although the commencement date of this section is not mentioned in the ERRA

2013).
- The power to make caste an aspect of race discrimination (*section 97*).

Employees who victimise colleagues who have made protected disclosures will become personally liable, and their employers will be vicariously liable for their actions, under section 19. This section is expected to come into force this summer.

Other provisions will come into effect in October 2013 or April 2014.

2: Employment Law implications of the Queen's Speech 2013

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There is a muted agenda in the Queen's Speech this year. Some proposals may however have an impact on employment law.

National Insurance Contributions Bill

The Bill aims to reduce the cost of employment and to support small businesses aspiring to grow, as well as deterring and tackling abusive tax schemes. The Bill will reduce employer National Insurance contributions bills each year by entitling every business and charity to a £2,000 Employment Allowance. This will commence from April 2014. The Bill will also extend the General Anti-Abuse Rule to NICs, strengthen legislation to prevent the use of offshore employment payroll companies, and remove the presumption of self-employment for LLP members.

Deregulation Bill

Continuing on the theme of reducing burden on business and regulation generally, the Government is proposing the publication of this Bill and the scraping of "many other regulations". The Deregulation Bill will seek to reduce or remove burdens on civil society, public bodies, the tax payer and individuals by repealing legislation that is no longer of practical use. It will remove the power for employment tribunals to make wider recommendations in successful discrimination claims under the Equality Act 2010. The Bill will exempt from health and safety rules those who are self-employed and whose activities pose no potential risk or harm to others. Apprenticeship provisions will also appear in this bill to enable greater flexibility in delivery and to increase employer involvement in the design and assessment of apprenticeships.

Immigration Bill

The Bill will enable "tough action" against businesses that use illegal labour, including more substantial fines.

Teachers Pay

There are also separate provisions for changes to teachers pay. This follows recommendations made by the School Teacher's Review Body (STRB) on 1st December 2012. The main recommendations of the STRB are:

- linking all pay progression to performance;
- removing automatic progression based on time served;
- giving schools the option of not recommending pay progression if a teacher's

performance is only satisfactory as opposed to good; and
- giving schools more scope to pay high performers more.

The Secretary of State has accepted the STRBs recommendations and the changes will come into effect from September 2013. A revised School Teacher's Pay and Conditions document setting out the arrangements of teachers pay and departmental advice to help schools reflect these in their own policies are available on the DfE website. A further provision is expected to be made available in August 2013 to update the pay tables.

This is mainly modest fare. But there are changes afoot of some importance for example in relation to employment tribunal rules, fees for employment tribunal claims and changes to TUPE which do not require primary legislation and so do not feature, as such, in the Queen's Speech.

3: Are pension contributions "wages" for the purpose of an unlawful deductions claim?

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No, says the EAT in *Somerset County Council v Chambers*.

Chambers was a social worker employed by the Council. He was a member of a superannuation scheme to which both the employer and employee contributed. He later became a locum social worker on a fractional basis. A change to the Local Authority Pension Scheme rules meant that a person could not be a member of the scheme unless he was employed under a contract of employment of more than 3 months duration. The Council suspended contributions but later re-instated them. There was a dispute about pay, holiday pay and pension contributions in the suspension period.

The employment tribunal awarded the sums claimed as being wrongful deductions from wages.

On appeal to the EAT, one of the questions was whether the employment tribunal had jurisdiction to award repayment of the employer's pension contributions on the basis these were deductions from "wages".

The EAT held that, notwithstanding the definition in s 27(1)(a) of the Employments Rights Act 1996 that "wages" means "any sums payable to the worker in connection with his employment", this did not mean contributions paid to a pension provider on the employee's behalf.

Chambers v Cromwell Group (Holdings) Ltd (EAT 1178/98) which had suggested the contrary was wrong and per incuriam (because this jurisdiction point had not taken).

4: TUPE information and consultation: who is an "affected employee"

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Under the Transfer of Undertakings (Protection of Employment) (TUPE) (Regulations 2006) information and consultation has to take place with appropriate representatives of any "affected" employees (TUPE, Regulation 13). The question of who is an affected

employee was dealt with in *I Lab Facilities Limited v Metcalfe*. Here, the employer facing insolvency contemplated transferring both parts of his undertaking. Eventually, however, the appointed liquidator transferred only one part, the other part being closed down.

The EAT held that employees employed in the part of the business which closed down and did not transfer were not "affected employees" for the purposes of information and consultation under TUPE. The phrase, held the EAT, was not apt to cover a case of this kind of indirect impact where the *transfer* had no impact on the employees. The impact on them was rather *the closure* of the business where they were employed.

Underhill J stated: "for the avoidance of doubt, we are not to be taken as saying that there can never be an obligation to inform and consult in relation to any employee of the transfer or who is not transferred. A proposed transfer may well affect such employees if they do some work in or for the undertaking (or part) whose transfer is proposed (albeit not "assigned" to that part): the loss of part of their work may well affect them. But that is different from saying that they are affected simply because the transfer has left the remaining part of the undertaking less liable".

The second point in the case is that with regard to the earlier intended transfer of both parts of the business, no claim could be bought in respect of the transfer which had not in fact proceeded (because it was eventually decided to close the business down). In the view of the EAT the scheme of Regulations 13 to 15 means that there can be no complaint of a breach of the obligations under them unless there has indeed been a relevant transfer. The EAT said "that is not an unacceptable result in policy terms. No doubt an intending transferor who takes no steps to inform or consult the employees potentially affected by the transfer is not behaving well and will be in breach if the transfer proceeds; but if in the end there is no transfer, and no employees are "affected", it does not seem to us axiomatic that any sanction is called for".

The cases contrast with a prior decision of the EAT in *Banking, Insurance and Finance Union v Barclays Bank Plc* [1987] ICR 495 where it was held that, for policy reasons, duty to inform applies also to a "proposed" transfer, even if it ultimately does not take place. This conflict between EAT rulings will at some stage have to be considered by the Court of Appeal.

5: Consultation on changes to the scope and governance of the Gangmasters Licensing Authority (GLA)

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The Government is seeking views on its plans to reduce the scope of the GLA licensing, to change the size and structure of the GLA Board and on the use of civil sanctions by the GLA. Consultation closes on 21 June 2013.

The Government is proposing that areas considered to pose a very low risk of worker exploitation should be excluded from GLA licensing to enable the GLA to focus on more serious criminal activities and abuse and to free those businesses from licensing costs.

Excluded areas would include:

- apprentices supplied by organisations operating under 'Apprentice Training Agency'- type recruitment and employment models;
- forestry workers, except in orchards, woodland pasture or free range egg

production;
- land agents engaged or contracted by landowners to manage the day-to-day running of estates;
- voluntary workers used or supplied to undertake conservation and other work on farmland or voluntary work in other regulated areas or activities;
- public and quasi-public bodies supplying workers via schemes to reintroduce the unemployed back into work on behalf of Government; and
- workers raising agricultural crops and livestock as a service to a third party.

It is further proposed that excluded sections could be brought back within the GLA regulations by the introduction of secondary legislation if there is clear evidence of abuse. Civil sanctions are also being planned to enable the GLA to deal with technical breaches in the law and to enforce 2004 Act offences without recourse to the courts.

Some changes are likely to come into effect as early as this Autumn.

6: Bouabdillah v Commerzbank AG ET/2203106/12

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The recent employment tribunal case of *Bouabdillah v Commerzbank AG* (ET/2203106/12) is an example of how protected acts done while employed by a former employer can lead to a victimisation claim.

The Claimant, Ms Bouabdillah, brought a sex discrimination and equal pay claim against her employer Deutsche Bank and resigned her employment with them. The Claimant looked for alternative employment and applied for a job at Commerzbank. At the various interviews for the job the Claimant was asked for her reason for leaving Deutsche Bank. The reasons given were that she wanted to work in a smaller team, citing a loss of trust in the management. Ms Bouabdillah did not mention at that stage that she had alleged discrimination on the grounds of her sex, nor did she mention that she had instituted proceedings against Deutsche Bank. The Claimant was successful in her application and was formally offered the role of Head of Product Engineering at the level of Director.

As part of the recruitment process the claimant completed a pre-employment application form which included a “Fitness and Propriety” section containing a number of questions required for FSA compliance. In one of the questions Ms Bouabdillah was required to disclose whether she had ever been the subject of civil proceedings in the UK, to which she replied “no”.

Commerzbank became aware of the litigation through a press article which outlined the claim and made reference to Ms Bouabdillah’s employment with Commerzbank. Commerzbank questioned why she had not disclosed the litigation on the application form and referred her to the staff handbook, which stated that employees must inform the bank of matters which might impair their ability to perform their duties, including matters which might adversely affect their or the bank’s reputational risk. The Claimant argued that the information was personal and irrelevant to the professional aspects of her job.

Ms Bouabdillah was dismissed by the bank, which cited a breakdown in trust and confidence caused by the Claimant putting her own interests above those of the Bank, and a failure to take a number of opportunities to mention the litigation. They further argued that the press article exposed Commerzbank to reputational damage.

The tribunal found in favour of the Claimant, concluding that Commerzbank had dismissed Ms Bouabdillah because she had brought tribunal proceedings. Ms Bouabdillah's claim that the litigation was a private matter and the publicity surrounding the claims did not affect her current employer's reputation was upheld. The failure to disclose the litigation did not go to the nature of the relationship with management, nor had the Claimant put her own interests above those of the bank in a way that would cause a breakdown in trust and confidence.

In addition, the tribunal found that Commerzbank's handbook misunderstood the concept of direct discrimination, while the witnesses did not understand how discrimination worked. It is worth noting that an employment tribunal currently has the power to make recommendations for the benefit of the wider workforce, such as retraining the staff or improving the handbook, although it did not use it in this case.

7: Does the increase in compensation due to a breach of the ACAS Code of Practice apply to "some other substantial reason" dismissals?

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Yes said the EAT on the facts in *Lund v St Edmund's School, Canterbury*.

Mr Lund had difficulties with his work, in particular, a frustration with the school's computer equipment. He alienated his colleagues, affecting morale. Ultimately he was dismissed as the school stated it had lost confidence in him.

The employment tribunal found his dismissal was for "some other substantial reason", but procedurally unfair because he had no warning of the dismissal meeting and no opportunity to appeal. His dismissal was also substantively unfair because no one had attempted to deal with his concerns about the computer system before, as the tribunal put it, "attitudes hardened on both sides". The tribunal awarded compensation, reducing it on ground of contributory fault.

But the tribunal made no uplift for breach of the ACAS Code of Practice pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. It considered that the Code of Practice was "silent" as to whether it applies to "some other substantial reason" dismissals. Mr Lund appealed on this point.

The EAT held the tribunal was wrong. The mere fact that the employee was dismissed not for a reason relating to his conduct, but for "some other substantial reason", did not mean that the employee's claim did not concern a matter to which the ACAS code applied. His claim concerned conduct on his part which led his employers to consider whether he should be dismissed, even if it was not his conduct, but the effect of his conduct on others, which was the ultimate reason for dismissal.

Nor was it correct to decline to apply the uplift simply because compensation had been reduced on ground of contributory fault. Mr Lund may have contributed to his dismissal but he had done nothing to contribute to the school's failure to act in accordance with the Code. To deny him an uplift on what remained of his compensatory award would have amounted to him being penalised twice over.

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