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— SOLICITORS —

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Employment Law BULLETIN

Welcome to our December employment law bulletin.

In this issue we note the long awaited response from the Government to the consultation on shared parental leave. There are interesting cases in the EAT on the nature of the personal work contract and on the meaning of the "single specific event or task of short term duration" exemption from service provision change TUPE transfers.

On the subject of TUPE, the draft Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 are available to read on the BIS website. But at the time of writing they have not been laid before Parliament.

Their intended commencement date is 31st January 2014, although it remains to be seen whether that timetable will be met. In the first of a number of articles on the new Regulations we cover the proposal to allow a transferee to take the benefit of pre-transfer consultation about collective redundancies.

Finally, our client briefing covers the risks for employees in office email and internet usage, providing some pointers for incorporation into an internet and email usage policy.

May I also remind you of our forthcoming events:

Click any event title for further details.

Managing Difficult Employees
- HR Workshop, 7th January 2014

The new TUPE Regulations
- Breakfast Seminar, 4th February 2014

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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: Recommendations by Whistleblowing Commission

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A Commission set up by the charity, Public Concern at Work, has published a report which makes 25 recommendations for improving protection for whistleblowers and encouraging a culture of compliance with whistleblowing legislation. Attached to the report is a draft code of practice, which the Commission recommends should be taken into account by courts and tribunals when deciding whistleblowing cases. The report recommends a number of amendments to the Public Interest Disclosure Act of 1998.

2: Government Response to the Consultation on the Administration of Shared Parental Leave

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The Government has published its response to the Department for Business, Innovation and Skills' (BIS) public consultation on the administration of Shared Parental Leave and Pay. The Shared Parental Leave and Pay scheme is being introduced under Part 6 of the Children and Families Bill, and aims to provide choice and flexibility for parents and employers in how they balance taking time off work in the early stages of the employee's child's life. It provides for a woman with a working partner, where they both meet the qualifying conditions, to be able to end her maternity leave early and take shared parental leave and pay with her partner.

The BIS consultation set out the Government's proposals for how Shared Parental Leave and Pay could work in practice. There were 87 respondents to the consultation, 43.7% of whom represented employers and 56.3% of whom were 'non employers', such as family groups, trade unions /staff associations, legal representatives and individuals.

The Government's main proposals for the administration of the scheme following the consultation are:

- The notice periods for paternity leave and pay are to be aligned so that the applicable period for both is the end of the 15th week before the expected week of childbirth (or within 7 days of being matched with a child for adopters), or as soon as reasonably practicable. This change was supported by the vast majority of respondents as a welcome simplification of the current rules which provide for different notice periods for leave and pay respectively.

- Where a mother has provided before birth the 8 weeks' binding notice to bring her maternity leave to an end required before the shared parental system can be taken advantage of, she will be able to revoke that binding notice up to 6 weeks' after birth.

- The notice period both for indicating an intention to take advantage of the Shared Parental Leave and Pay scheme, and for taking any leave as part of the scheme is to be 8 weeks. In respect of leave requests, this will include a 2 week discussion period to allow employer and employee to negotiate the precise leave arrangements.

- It will be a requirement that the notice of intention to take advantage of shared parental leave and pay includes the same mandatory information currently required under the Additional Paternity Leave scheme (i.e. the name and National Insurance numbers of the mother and the father (or mother’s partner), and the number of weeks of maternity leave and pay or allowance taken) in addition to information about the total number of weeks available as shared parental leave and/or pay and how shared parental leave and/or pay will be shared between the mother and the father (or the mother’s partner).

The Government had initially proposed that parents be allowed to notify their employer of their leave intentions as they required the leave, rather than upfront, but a majority of employer respondents were opposed to this proposal, citing the burden it would impose on business in terms of workforce planning and payroll and the difficulty in arranging cover for short leave patterns. As a consequence, it will now be a procedural requirement for employees to provide a non-binding indication of their expected pattern of leave as part of the mandatory information for notifying their employer of their eligibility and intention to take shared parental leave. This non-binding indication will not constitute a formal notice to take the leave indicated, and an employee will still need to submit a formal notice with the minimum notice period of 8 weeks for any leave they wish to take.

- A cap of three notifications to take leave or to alter a previous notification will be imposed on each employee, it having been concluded that the initial proposal of unlimited notifications threatened to provide employers with so little certainty that the effective operation of the scheme would be undermined. Changes to notified leave which are mutually agreed between the employer and employee will not count towards the limit, and it will remain open to employers and employees to agree a higher number of permitted notifications.

- The cut off point for taking shared parental leave will be 52 weeks from birth. This was favoured as being consistent with the current position under Additional Paternity Leave as opposed to the alternative of 52 weeks from the start of

maternity leave.

- Each parent will be allowed up to 20 'Keeping In Touch (KIT)-style' days while on shared parental leave on which they will be able to return to work without bringing their statutory leave and pay to an end. This might be considered a surprising amendment to the Government's initial proposal of 10 such days per parent, given that all respondents expressing an opinion on the matter felt either that 10 days was an appropriate number, or that it was too high an allocation. The Government, however, regards KIT-style days as "a light-touch mechanism that enables employers and employees to come to a mutually beneficial agreement about returning to work for a few days during a longer period of leave." These days will be additional to the 10 KIT days available to a woman on maternity leave and will only be able to be used if both employee and employer agree.

- The right to return to the same job will be maintained for employees returning from any period of leave that includes maternity, paternity, adoption and shared parental leave that totals 26 weeks or less in aggregate, even if the leave is taken in discontinuous blocks. In fact, a majority of respondents (59%, 70% of whom were employers) preferred that the right should only be maintained for employees returning from the first continuous block of leave of 26 weeks or less, but this was rejected by the Government on the grounds that it risked creating arbitrary results and giving rise to problems of sex discrimination. The aggregate approach was also considered more conducive to the flexibility that the new system is intended to achieve.

The new Shared Parental Leave and Pay scheme is intended for implementation by 2015.

3: The personal work contract and the Equality Act 2010

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This was the judgement of the Employment Appeal Tribunal (EAT) in *Halawi v WDFG UK Ltd (t/a World Duty Free) and another*.

Ms Halawi worked as a uniformed beauty consultant airside at Heathrow airport selling Shiseido cosmetic products in a space allotted to Shiseido within premises occupied by World Duty Free (WDF). She had no written contract of employment, and provided her services through a company, Nohad Ltd, which invoiced CSA (the second respondent in the case). CSA provided a management service to Shiseido, which included the staffing of Shiseido's space in WDF's airport outlet. WDF managed the outlet as a whole. WDF subsequently withdrew the security clearance Ms Halawi required to carry out her work in circumstances she claimed amounted to unfair dismissal and discrimination.

The Employment Tribunal dismissed Ms Halawi's claims on the basis that Ms Halawi lacked the prerequisite employee or worker status. These statuses required the existence, as between Ms Halawi and WDF or CSA, of either a contract of employment or a contract under which Ms Halawi undertook to work personally, and Ms Halawi had been unable to show either. The essential elements of control, mutuality of obligation and an obligation to carry out the work personally were absent, given that she had a right, which was not merely theoretical, but acted upon in practice, to change shifts, reject shifts, and send a substitute to complete shifts in her place, did not get paid if she did not

work, and accepted that she had no entitlement to sick or holiday pay. As against CSA, Ms Halawi's claims also failed because the Tribunal found that CSA's relationship had been with the company, Nohad Ltd, and that there had been no separate relationship between CSA and Ms Halawi.

Ms Halawi appealed the judgement in so far as it related to the Equality Act 2010 section 83 definition of employment, contending that the Judge had erred in concluding there was not "a contract personally to do work" falling within the definition. Section 83 was to be interpreted in the context of the underlying EU Law which, it was argued, required a purposive approach focusing on the facts, not the structure, of the working relationship. A position of subordination, not personal service, was the key requirement of the employment relationship and the Judge had thus been wrong, she argued, to focus on the questions of whether there was a contract and an obligation personally to do work.

The EAT however dismissed the appeal. EU law, it held, did not require it to interpret the words "contract personally to do work" as if the words 'contract' and 'personally' were not present, and even if EU law had required such an interpretation, in looking at the reality of the working relationship and considering factors such as mutuality of obligation, control and the absence of personal service, the Tribunal had adopted the correct approach and reached the correct conclusion on the facts. Her claim failed.

4: What is the meaning of the "single specific event or task of short term duration" exception to service provision change TUPE transfers?

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The EAT has given helpful guidance in *Swanbridge Hire & Sales Ltd v Butler*.

Kitson Environment Europe had a contract for insulation and cladding work on five power station boilers on behalf of Shaw Group Ltd. There was a parting of the ways and Kitsons were replaced by Swanbridge, who finished the work. Was this a service provision change under the TUPE regulations?

Under Reg 3 (3) (ii) of TUPE there will not be a service provision change if the client intends that the activities are, following the change, to be carried out in connection with a single specific event or task of short term duration. The Employment Tribunal held that the insulation contract was not ‘a single specific event or task of short term duration’. The contract was ‘lengthy and protracted’. It took 18 months to complete, of which 8 months were in the hands of Swanbridge. There was therefore a service provision change and TUPE applied.

The EAT allowed an appeal against this finding. First, the employment judge failed to consider the intention of the client at the time of the alleged service provision change. The exception applies where it is the client’s intention to contract for a single specific event or task and the tribunal failed to make findings in this regard. Secondly, the employment judge also erred in deciding whether the ‘event’ (although the EAT considered it was a ‘task’) of insulation and cladding of the boilers was short term by reference to how long, cumulatively, both the outgoing and incoming contractor spent on the work.

5: The New TUPE Regulations: Transferee to take benefit of pre-transfer "consultation" over collective redundancies

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Given that dismissing employees prior to a TUPE transfer on ground of redundancy is fraught with legal difficulty and, commonly, employees TUPE into a new employer only to be made redundant thereafter, many clients consider that it would make sense for, in larger redundancies, compulsory information and consultation in favour of appropriate representatives to start prior to the transfer even though the transferee is not yet the employer. The draft Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 make provision for this.

The regulations create a new section 198 (A) and 198 (B) of the Trade Union and Labour Relations (Consolidation Act) 1992.

The new regime is engaged when the following conditions are met:

- There is to be, or is likely to be, a transfer;
- The transferee is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less; and
- The employees who are to be (or are likely to be) transferred from the transferor's to the transferee's employment under the transfer (transferring employees) include one or more employees who are may be affected by the proposed dismissals or by measures taken in connection with the proposed dismissals.

In that event the transferee may elect to consult, or start to consult, representatives of affected employees, including transferring employees, about the proposed redundancies, before the transfer takes place.

The election can only be made if the transferor agrees to it. The election must be made by way of written notice to the transferor. If the transferee elects to carry out pre-transfer consultation, sections 188 to 198 of TULRe(C)(A) apply (i.e. the duty to inform and consult is imposed on the transferee).

The transferor may provide information or call other assistance to the transferee to help the transferee meet the requirements of the redundancy consultation rules.

It should be noted however that, notwithstanding this facility for cooperation, any failure on the part of the transferor to provide information or other assistance to the transfer does *not* constitute special circumstances which make it not reasonably practicable for the transferee to comply with the information and consultation requirements.

If an election by the transferee has been made to carry out the pre-transfer consultation, this can be cancelled by written notice to the Transferor. If so, the slate is wiped clean and the pre-transfer consultation has no effect.

If a protective award is made, ordering a transferee to pay remuneration for a protected period in respect of the transferring employee, then, so far as the protected period falls before the relevant transfer, the transferor is to be treated as the employer for the purposes of determining the period and rate that which that the employee is entitled to be paid remuneration by the transferee.

Some commentators believe that allowing a transferee to inform and consult before it actually becomes an employer may be in breach of the EU Collective Redundancies Directive. But apart from the EU compliance issue there are some big problems in practice.

First, workers would lose out on extended pay and holidays due to this "compressed" consultation. Secondly, there will inevitably be conflicts between the transferor and transferee over who should transfer and who should be made redundant. And the take-up of this measure is not certain. According to BIS "… it is unclear how many businesses will decide to use this measure". It is not apparent when, precisely, the draft Regulations will come into force. The BIS website states "January 2014". Further detail will follow in the New Year.

6: Client Briefing: Online and e-mail risks

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This client briefing highlights the risks all employees should be aware of when using e-mail and internet at work, sending work related e-mails or discussing the workplace on the internet. The text is directed to employees, but it is suggested that some of the guidance discussed here might usefully be incorporated into an employer's internet and email usage policy.

Reputational risks

What you write in emails or on the internet could seriously damage your own or another person's reputation, you could lose your job and you or the organisation could be sued.

Stop and think before your click

- Anything written in an email has the potential for public exposure (for example, if the email is forwarded to others).
- Posting on the internet is essentially making a public statement (for example, when commenting on social media sites, blogs or other electronic forums).
- Failing to take care about what you write can have serious personal, disciplinary and financial implications.
- Even if you are emailing or using other forms of online communication in your own time, if you refer to people at work or work related matters, you and your organisation to get into trouble.

Emails and internet postings can be used in legal proceedings

- Emails and internet postings can be used against you or your organisation in legal proceedings, disciplinary meetings or other regulatory investigations.
- Never delete emails relating to a legal dispute or investigation or potential dispute or investigation.

It is very difficult to delete emails and online postings

- Simply deleting emails or internet postings will not necessarily eradicate them. Forensic IT equipment can still find supposedly "deleted" messages.
- What you publish online will likely be available for a long time, to be read by anyone, including the organisation itself, future employers and colleagues.

Do not be hurtful or spread rumours

- Never send emails or post content online that could be thought of as obscene, racist, sexist, bullying or hurtful.
- Never exaggerate or make a false or inaccurate statement about another organisation or person. A person can be sued even if an email was only sent to one person.
- Forwarding an email can be just as serious as writing the original – legal action can ensue even if the original was sent or forwarded only to one person.

Take care with confidential information

- Where possible, avoid sending confidential information (such as confidential intellectual property or trade secrets) by email. Take legal advice on how the information can be best protected.
- Any email containing confidential information should be clearly marked as "confidential".
- If you receive an email that contains another organisation's confidential material (for example a company's trade secrets) and the email was not part of a legitimate business transaction, you should take legal advice immediately.

Do not make a contract by mistake

- A legally binding contract can be made by a simple exchange of emails.
- Make it clear if you do not intend the email to be binding. Use of the words "subject to contract" are always advisable. Likewise, if settlement of an issue is a matter for discussion, always mark the email "without prejudice".
- Do not copy someone else's work.
- Only use or attach other peoples work to your emails if you have permission or you know it is not protected by copyright or other intellectual property rights (for example, trademark rights). This includes photographs and music.
- Do not assume that work you find on the internet is free to use.
- Do not send or view offence or unknown material.
- Monitor what arrives in your inbox, especially if you do not recognise the sender or

the title of the email seems odd.

- If there is a risk that an email may contain a virus, do not open it, and inform the IT department immediately.
- An employee can be disciplined for forwarding inappropriate emails or accessing inappropriate websites at work.

Avoid unproductive usage

- Most organisations allow light personal internet and email usage as long as it does not interfere with an employees' duties. However, excessive, unproductive usage, is not to be permitted and may be treated as gross misconduct. Producing an email and internet usage policy, and outlining the possible consequences of breach, is important.
- Emails can often be a waste of time. Think carefully before copying someone in on an email, especially if there is a long chain of emails attached.
- Considering, when responding to emails, or, particularly, when forwarding emails, cutting off the chain of emails prior to that email which you are forwarding. The prior emails may contain material that you do not wish to be forwarded.

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