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Employment Law BULLETIN

A happy new year to all and welcome to our first bulletin of 2012. There is a mix of case law, policy and legislative developments, including a couple of useful TUPE cases which clear up previously uncertain aspects of the law.

May I remind you also of our forthcoming employment law breakfast seminar on 7 February on "Dismissing fairly for conduct and performance".

Click here for details - we hope to see you there.

Also, on 15 February we are combining with ACAS in the North East to provide a 1 day practical workshop on business transfers and understanding TUPE. Details are contained within this bulletin.

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

1: Increase in Tribunal Compensation Limits

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New increased compensation limits for employment tribunal claims come into force on 1st February 2012. These include a revised figure of £430 (currently £400) for the maximum amount of a week's pay (used for calculating various awards, including statutory redundancy payments and unfair dismissal basic awards), and a higher maximum unfair dismissal compensatory award of £72,300 (currently £68,400). The limits are increased by the Employment Rights (Increase of Limits Order) 2011 (SI 2011/3006).

2: What is acceptable use of social networking?

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You may have an IT and email policy in place but have you thought about the impact of social networking in the workplace and what your business considers to be acceptable use of social networking?

You may be concerned that the inappropriate use of social media at work affects productivity but there are other potentially more serious repercussions. A number of cases are currently passing through the courts which relate to derogatory remarks made against colleagues and employers on social media sites. To minimise the risk of having to deal with such issues it is important to take proactive measures while striking a balance between protecting your staff and business while not intruding on the privacy of your employees.

A report from the Institute of Employment Studies, commissioned by ACAS, highlights the difficulties some employers have in setting standards of behaviour for the use of social network tools. It advises employers to take a common sense stance to regulating behaviour and to treat "electronic behaviour" as you would "non-electronic behaviour".

This report and other useful guidance on social networking and the workplace may be found on the ACAS website at **www.acas.org.uk/socialnetworking**.

3: Home Office Guidance on the public sector equality duty and specific duties

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Two "quick start guides" aimed at helping public sector bodies understand and comply with the unified public sector duty and the specific duties under it have been published by the Home Office. **Click here to view the material**.

4: Unfair Dismissal and Redundancy: the duty to consider alternative employment

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In **King v Royal Bank of Canada Europe Ltd**, it has been confirmed that, to avoid an unfair dismissal claim after a redundancy, the employer must show it took reasonable steps to re-deploy the employee and, in this regard, if it wishes to establish to the Tribunal that they were no suitable vacancies that the claimant could or would have taken, it must produce the evidence as to what vacancies existed throughout the *whole* period over which it consulted (or over which it should have consulted) the employee. It is very common for vacancies to arise during a period of consultation and it would not be sufficient for the employer to produce, and for the Tribunal to confine itself to considering, evidence regarding what vacancies existed only at the start of the period.

5: Indemnity in Compromise Agreement - Did it cover legal expenses associated with a criminal investigation against an ex-employee personally?

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The question for the High Court in **Coulson v News Group Newspapers** was whether an indemnity in a compromise agreement obliged an employer to pay an ex- employee's legal expenses associated with a criminal investigation into action alleged to have been taken by him when he was an employee.

Mr Andy Coulson was employed as editor of the News of the World between 2003 and 2007. His termination agreement provided for reimbursement of legal expenses "which arise from his having to defend, or appear in, any administrative, regulatory, judicial or quasi-judicial proceedings as a result of his having been editor of the News of the World".

Coulson was arrested and interviewed by the Metropolitan Police in connection with allegations of intercepting communications and making unlawful payments to police officers. He denied the allegations, was bailed, but not charged. He claimed payment of his professional costs under the agreement. This was refused. Coulson brought proceedings for a declaration as to the effect of the agreement under Part 8 of the Civil Procedure Rules.

It was held that although the indemnity was wide ranging, seeking to protect Coulson from legal professional expenses arising from the "ordinary occupational hazards" of being an editor, it did not cover criminal allegations against Coulson personally. If that were wrong, said the trial judge (Supperstone, J) the indemnity was not in any event engaged as, following the wording of the agreement, no "proceedings" had been commenced.

6: TUPE and Service Provision Change - Must the activities carried out by different providers before and after the transfer be carried out for the same client?

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In **Hunter v McCarrick** the Claimant was employed by a provider of property services. The company which owned the properties became the subject of a winding up petition. The lender on the properties appointed Law of Property Act Receivers who assumed control of the properties thereafter and appointed a new property services company. It was held there could be no service provision change when not only was there a change in contractors, but also of the client.

Reg 3(1)(b)(ii) provides that a service provision change occurs where activities cease to be carried out on a client's behalf and are instead carried out by a subsequent contractor on the client's behalf. That had to be read as meaning the same client. As a service provision change under Reg 3(1)(b) is a wholly new statutory concept independent of the Acquired Rights Directive, there was no warrant for adopting an interpretation of it other than those required by the ordinary meaning of the language used.

7: TUPE and Administration

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Under Regulation 8(7) of TUPE, where the transferor is the subject of "bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor" employees do not automatically transfer to the transferee and do not gain the protection, under TUPE, against transfer connected dismissals. European Court case law stresses that one must look at the *purpose* of the insolvency proceedings to see whether it is the liquidation of the assets of the transferor (TUPE does not apply) or is with a view to the survival of the company (TUPE will apply). What is the position where a purchaser buys an ailing business from an administrator? Are administration proceedings instituted with a view to the liquidation of the assets of the transferor or is it a procedure to ensure the survival of the business?

At first it was thought the question was straightforward. The general purpose of administration is to rescue the company as a going concern. TUPE should therefore apply. But in a controversial EAT decision in *Oakland v Wellswood (Yorkshire) Limited* [2009] IRLR250 it was held when part of a business was transferred as part of a pre-pack administration an employment tribunal had been entitled to find that the transferor employer had been subject to proceedings instituted with a view to the liquidation of the assets of the transferor. This was largely because of the wording of paragraph 3 of schedule B1 to the Insolvency Act 1986. This states that although the *primary* purpose of administration is to rescue the company as a going concern, the administrator must consider whether a better result for the company's creditors could be achieved, for example realising property in order to make a distribution to creditors. In *Oakland* the administrators decided that it was not possible to rescue the company as a going concern and proceeded to realise its assets (which included a sale of part of the business). This decision caused great uncertainty. Whether a purchase from an administrator would be covered by TUPE or not would depend on the facts of each case.

That approach was rejected by a subsequent EAT decision in OTG Ltd v Barke and others [2011] IRLR 272 where the EAT held that administration in principle can never fall within Regulation 8(7) of TUPE and administration can never be a bankruptcy or analogous proceeding instituted with a view to liquidation of the assets of the transferor. This was a triumph of the "absolute" approach over the "fact based" approach adopted in Oakland.

Now the Court of Appeal in **Key2Law (Surrey) LLP v De'Antiquis** has upheld the reasoning of the EAT in *OTG Ltd v Barke*, preferring the absolute approach whereby Regulation 8(7) can never apply to purchases from administrators and therefore TUPE will always apply in such circumstances. It is necessary to focus on the general purpose of administration not on the particular fats of each case.

8: Damages for breach of a contractual disciplinary or dismissal procedure

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Many employers do not realise that a disciplinary procedure may form part of the employment contract. If a dismissal takes place without the procedure being followed an employee may have not only an unfair dismissal claim, but also a claim for breach of contract (by reason of the fact that the employer has not followed the contractual procedure). The question that has raged over the years is: what value does that breach of contract claim have?

Sometimes, in relation to employments of a public nature, an employee can obtain an injunction to restrain a dismissal that is in breach of a disciplinary procedure, thus preventing the employer from relying upon the dismissal until the procedure has run its course. This is often important, for example, in the medical profession, where it is important for a doctor to enjoy a procedure, including a hearing, before dismissal, in order to have the chance to clear his name. But what would be the value of a damages claim for breach of contract?

The traditional view has been that the value of the claim is very limited. An employee who is dismissed in breach of a contractual procedure has for long being thought only to have a claim for damages for loss of chance to be employed for the period over which the procedure would have taken its course had the employer adhered to it. Sometimes this may just be a matter of weeks or, in some public sector employments, a few months. Of course, if the employee has been dismissed without notice, the contract claim can also compensate the employee for loss of remuneration during that notice period. But, traditionally, the Courts have refused to go any further.

However, in the Court of Appeal, in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2010] EWCA Civ 571, it was held that an employee may obtain damages at large for loss of chance to remain in employment on the assumption that had the procedure been properly followed, the employee might not have been dismissed at all.

But the Supreme Court (by majority) in **Edwards** has restored orthodoxy, so damages or breach of contract are limited to, first, a sum to compensate for the duration of the contractual notice period and, secondly a sum for the extra period which would have elapsed had the employer honoured the disciplinary procedure prior to the dismissal.

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