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Employment Law BULLETIN

Welcome to our February employment law bulletin.

We include the usual variety of policy and legislative developments and case law.

May I remind you of our forthcoming employment law breakfast seminar on 3rd April 2012 on **"Absence management & the law"** - click here for details.

Also, on 20th March 2012 we are holding a half day workshop on **"Handling disciplinary matters"** - click here for details.

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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: Launch of a pilot scheme for two regional mediation networks for small and medium sized enterprises.

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The Department for Business, Innovation and Skills has announced two regional mediation networks where BIS will fund mediation training for employers from a group of 24 SMEs in Cambridge and Manchester later this year. A network of trained mediators will be available to provide mediation to other organisations in their respective network. The Government hopes that this will help resolve workplace disputes at the earliest opportunity and before they reach the employment tribunal stage.

The pilots will run for 12 months and if successful, the Government will consider introducing them into other areas of England, Scotland and Wales.

2: Compromise Agreements under the Equality Act 2010.

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You will probably remember being advised that when the Equality Act 2010 was drafted, the section concerning compromise agreements in respect of equality claims (s.147 of the Equality Act 2010) seemed to contain an error. On one reading, the drafting of s.147 precluded a complainant's lawyer from being an "independent adviser". The Government position was that although the wording was not the same as is used in other employment legislation, it was workable. John Bowers QC and Tom Linden QC gave conflicting legal opinions. Nonetheless, Government continued to state its position that there was no problem. Cautious advisers however have been forced to say that there was a potential loophole which could be met, in practice either by delaying a compensation payment until after the limitation period had expired (which was not popular with claimants) or by using an ACAS COT3 via an ACAS conciliation officer.

Now, however, the Government has rectified the problem once and for all. The Equality Act 2010 (Amendment) Order 2012 (SI 2012 No. 334) coming into force on 6 April 2012, amends s.147 and for the future, equality claims can be settled via a compromise agreement with the legal doubt removed.

3: Ageist comments and age discrimination.

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In **James v Gina Shoes Limited** and others Mr James was a production manager at a shoe factory. The managing director had identified performance issues. Mr James took sick leave through stress after a day when he was "shadowed" by the sales and marketing director who was checking on Mr James' management style. The next week the managing director asked Mr James whether it was his age that caused him not to be able to meet their expectations. He also said that if Mr James was "younger" it might be possible to train him. Mr James was upset by these remarks and resigned. At a grievance meeting the managing director said to Mr James: "you can't teach an old dog new tricks".

Mr James brought constructive unfair dismissal and age discrimination claims. He won his unfair dismissal claim but the employment tribunal thought there was insufficient evidence to make out a prima facie case of age discrimination. It thought that the words had been taken out of context. The EAT overturned the tribunal on this point. In its view, the remarks about age "plainly raised… a prima facie case of discrimination". It therefore required a non-discriminatory explanation from the employer.

4: Draft order will enable employment judges sitting alone to hear unfair dismissal cases.

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The Government has published the draft Employment Tribunals Act 1996 (Tribunal Composition) Order 2012. The Order will amend Section 4(3) of the Employment Tribunals Act 1996 which provides for proceedings to be heard by an employment judge sitting alone. The amendment will include unfair dismissal claims in the category of proceedings that can be heard by an employment judge sitting alone. This change was first mooted by the Government's response to its *Resolving Workplace Disputes* consultation. The change will take effect from 6 April 2012, subject to parliamentary approval.

5: Unfair dismissal and the two year qualifying period.

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As is known, the unfair dismissal qualifying period will rise from one year to two years from 6 April 2012 (see draft Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012).

But employers need to study the small print. The change will *not* affect employees whose period of continuous employment began before 6 April 2012. So those employees who have already acquired one year's continuous employment or who are in the process of acquiring it will still be subject to the one year qualifying period. Only those employees who are hired on or after 6 April 2012 will be subject to the two year qualifying period.

6: TUPE and service provision change: No transfer where the activities were not essentially the same afterwards, compared with before.

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As is clear from cases such as *Metropolitan Resources Ltd v Churchill Dulwich Ltd* [2009] ICR 1380 and *OCS Group UK Ltd v Jones* (EAT/0038/09), for the purposes for assessing whether there has been a relevant transfer of an undertaking under the service provision change rules in regulation 3(1) (b) of the TUPE regulations 2006, the activities changing hands must essentially remain "fundamentally" or "essentially" the same after the transfer, compared with before.

This advice has been repeated by His Honour Judge Peter Clark in **Enterprise Management Services Ltd v Connect-up Ltd**. At the time of the case Leeds City Council (LCC) had responsibility for some 300 schools in the Leeds area. Prior to 2004 LCC supplied IT support services to those schools in-house. In 2004 this service was put out to tender. Enterprise was the successful bidder. A framework agreement was entered into, granting Enterprise preferred provider status. Under this, schools were offered two service levels, option A being total support and option B support and maintenance of management information systems (MIS) software.

In 2009, when the framework agreement was due to expire, Enterprise's business had dropped to 80% of the schools, others having chosen different providers. Of the remaining schools with Enterprise, some 20 out of the 240 schools signed up to option A and the remainder to Option B. On expiry of the framework agreement LCC invited tenders for a new agreement. Enterprise did not bid for it, considering the requirements of the new contract were different from the old. Indeed the Employment Judge found that although there were some similarities between the 2004 agreement and the proposed new contract, there were "significant differences between the two". The most significant difference, he found, was that the new proposed contract excluded any service cover provided for curriculum systems. This had been 15% of the work of the Enterprise staff assigned to the LCC service.

Connect-up successfully bid for the new contract. But others were involved. Using language of the case there was "something of a free for all". Connect-up soon lost 40% of the 240 schools formally serviced by Enterprise to 5 other service providers. In the meantime, Enterprise had dismissed the employees who had been working for it under the framework agreement (apparently not on the grounds of redundancy). The EAT upheld the Employment Judge's finding that although there was organised grouping of employees employed by Enterprise, which had the principal purpose of carrying out activities under the framework agreement on behalf of LCC, after the expiry of the framework agreement there were "significant" differences between the activities carried out by Connect-up compared with those carried out by Enterprise. (Though of interest is the finding that this "significant" difference affected just 15% of the contract). This meant there was no TUPE transfer.

As a second ground against a relevant transfer, the break up of schools serviced by Enterprise was so fragmented amongst other providers, as well as Connect-up, that, on this alternative basis, no service provision change had taken place. In that respect that part of the decision is consistent with the decision of HHJ Peter Clark in *Clearsprings Management Ltd v Ankers* (EAT/0054/08).

7: Dismissal to effect post-Transfer changes to employment terms and regulation 7 of TUPE

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Employers often feel frustrated by what they perceive as an inability to change employment terms following a TUPE transfer, either by agreement or by dismissal to effect the introduction of a new employment contract for those who accept it. Under TUPE, regulation 4(5) however, any purported variation of the employment contract is void if the sole or principal reason for the variation is the transfer itself. And under regulation 7 of TUPE if either before or after a relevant transfer, any employee of the transferor or the transferee is deemed automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer itself.

In **Enterprise Managed Services v Dance** (EAT/0200/11) the employer dismissed employees in connection with a process to encourage new contracts. The facts of the case were that Enterprise Managed Services (EMS) had a contract with Modern Housing Solutions (MHS) for the provision of appliance maintenance services. The contract was due to expire in 2009 and prior thereto MHS informed EMS on expiry of its current contract a single contract for appliance maintenance and building maintenance (which was being carried out by another contractor, Williams) would be awarded and the successful contractor would have to not only reduce cost but also improve service delivery efficiency and productivity.

Prior to the expiry of the contract EMS considered a review of the employment terms of the appliance maintenance engineers and proposed the introduction of performance related pay. This was accepted by the engineers by March 2009, in time for the new contract. The new, single contract was awarded to EMS. As a result, of course, Williams lost its contract (Williams had not made any changes to its employee's terms and conditions) and the Williams employees transferred into MHS. Following the transfer, EMS concluded that the productivity and efficiency conditions imposed by MHS could not be met without making the same employment changes for the transferred Williams employees. The employees declined to accept these changes and were dismissed. The employees argued that the sole or principal reason for the dismissal was the transfer itself. The employer argued that the dismissal was for a good sound business reason to improve productivity. The issue was whether the dismissal was connected with the transfer.

The majority of the tribunal held that the principal reason for the dismissal was to achieve harmonisation with EMS's existing employees. The efficiency and productivity that would arise was a consequence of harmonisation but not the principal reason for variation. The minority member of the employment tribunal, Judge Coles, considered that the principal reason for the variation was to achieve improved performance and efficiency and thereby properly service and retain the contract with MHS. The fact that this would result in harmonisation with the terms and conditions of existing employees would have been a consequence of the variation but not the principal reason for it.

The EAT reversed the majority decision of the employment tribunal, taking the view of the minority. The EAT accepted counsel's proposition that what needed to be decided on was the reason in the minds of the management for invoking proposals to change the terms and conditions and, on resistance by the workers, to dismiss them. In other words, the harmonisation perceived by the majority of the employment tribunal was not as the EAT put it "… a simple wish to harmonise out of tidiness, for example". The harmonisation was driven by the success of the productivity changes that predated the transfer of the employer's business. The majority put the sequence the wrong way round. The correct sequence was the employer's desire to effect productivity and harmonisation was merely a consequence of that. Thus:

> "It seems to us that since it is open to an employer to effect productivity changes in accordance with the ordinary law, this does not become unlawful where there has been a relevant transfer if the reason is connected to that drive of productivity changes"

This decision may be regarded as a more employer oriented approach to effecting contractual change following a TUPE transfer. Whether this thinking will be developed further, remains to be seen.

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