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Employment Law BULLETIN

Welcome to our March employment law bulletin.

The EAT has been busy with cases on redundancy, illegal contracts and TUPE. Read on for more details.

May I remind you of our forthcoming half day HR workshop on 15th May 2012 on **"Absence management – the practicalities"** – click here for details.

A date for your diary. Our annual **employment law update seminar** will be held in York on 14th June 2012. As well as strategic and practical employment law and HR subjects the day includes a guest keynote speech from Ed Sweeney, Chair of ACAS. Details will be mailed out shortly.

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6: Can a worker enforce employment rights dependent on the contract of employment if the contract was illegal from the outset?

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

1: BIS Consultation on Modern Workplaces.

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Due to ongoing discussions within Government there is a reported delay in publishing the Government's response to the Modern Workplaces consultation. However, the Government response will be published "during the Spring".

2: Women on Boards: One year on.

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Lord Davies of Abersoch has published the first annual progress report on his review of Women on Boards. The March 2012 report tracks current progress against each of Lord Davies' 10 original recommendations. His first recommendation proposed that FTSE 100 boards should aim for a minimum of 25% female representation by 2015. To date, 17 companies in the FTSE 100 have already achieved the 25% target and a further 17 are currently between 20% and 25%. Over the next year Lord Davies in his power will prioritise work towards reaching the 25% target in FTSE 350 companies and on building a sustainable, credible, supply of board-ready women through training and development initiatives (source: BIS website).

3: Olympic Games 2012 – it's all in the preparation.

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Have you begun to make plans in the workplace for the London Olympics? There are a number of employment law issues to consider and advance planning may avoid some stressful situations while the Games are on.

Your employees are likely to fall into two camps – those who are spectators or volunteers and need time off work to attend events, and those who have no plans to take time off work but who hope to catch the action on the television or via internet coverage. You may even have a third camp who are generally disinterested in the Games and resentful of covering for the sports enthusiasts. If you are based near any of the Olympic venues you may have staff wishing to take annual leave for the duration of the Games to avoid anticipated disruption.

Your plans for the Games should include managing attendance, dealing with performance issues and understanding the position of volunteers. The best way to deal with applications for leave to attend events is to apply the first come first served principle and it is a good idea to issue some specific guidelines on applying for leave. You may consider introducing flexible working or using existing flexible arrangements to allow employees to attend events or watch the most popular sporting events on the television. Some employers in central London have made arrangements for employees to work from home or travel to work at different times because they anticipate a huge strain on public transport.

You may have to deal with attendance problems if employees take the odd day as sick leave if they are not granted annual leave and performance issues if they are spending work time watching the Games on the internet. It is a good idea to have a clear policy on how you will deal with such issues and publicise it in advance. You may consider giving employees access to TV coverage at agreed times.

If you have not already done so, you should identify whether any of your staff have been selected as volunteers at the Games and plan how you will deal with their requests for leave. Volunteers may be required to assist at the Games for up to 13 days and they will request this time off as annual leave or unpaid special leave. Volunteers have no statutory right to time off from work, whether paid or unpaid. Many employers are keen to encourage volunteering and social

responsibility amongst their workforce, but you need to plan how you will balance such aspirations against your normal business requirements.

4: Working Time Directive under the spotlight.

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On 6 March 2012 Vince Cable spoke of a wish to relax certain EU Directives in the labour law field, including the Working Time Directive. The following is an extract from his speech at the EEF National Manufacturing Conference 2012.

"Many of the most intrusive and unnecessary burdens come from the EU, and we are seeking to keep these at bay, working with like minded governments at the upstream stage. I am quite willing, as is Norman Lamb the Minister for Employment Relations, to take a more confrontational approach by taking every possible opportunity to delay, consult further, and water down directives that we agree are damaging to Britain, with the Working Time Directive as an obvious example".

5: Redundancy and restructuring - appointing "the best person for the job".

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In **Samsung Electronics v Monte D'Cruz** the EAT held that when, after a reorganisation, a redundant employee is invited to apply for a newly created role the employer can appoint "the best person for the job", even if that involves a degree of subjectivity.

Samsung reorganised its print division. The claimant was one of three heads of department who were informed their roles would be abolished and merged into a new, single position of head of sales. The claimant unsuccessfully applied for this post. He was assessed on a presentation and scored against competencies normally used in the annual appraisal process. He then unsuccessfully applied for a more junior role, arising out of the restructure. An outside candidate was eventually appointed. The employment tribunal found the dismissal unfair because of inadequate consultation and because the criteria for selection for the new roles were too "subjective".

The EAT reversed the tribunal as to the quality of consultation; the tribunal had erred by substituting its own view for that of the employer. As to the arrangements regarding suitable alternative employment, a tribunal should certainly consider how far an interview process was objective. But although, said the EAT, "subjectivity" in redundancy cases was often seen as a "dirty word", where a post has disappeared and an employer was selecting from a new role, some subjectivity was inevitable. Tribunals should bear in mind the views of the EAT in Morgan v Welsh Rugby Union [2011] IRLR 376 that "an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgement".

6: Can a worker enforce employment rights dependent on the contract of employment if the contract was illegal from the outset?

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In **Zarkasi v Anandita** the claimant was an Indonesian domestic worker recruited from Indonesia to work for a family in the UK. To enter the UK she obtained an identity card, passport and visa from a passport office in Jakarta using a false identity. Ultimately she left her employer in the UK and brought a number of employment claims dependent on a contract of employment.

It was held by an employment tribunal that she had freely and voluntarily participated in an arrangement to enter the UK by pretending to be someone else in order to work for her employer. That made the contract unlawful as being proscribed by law when it was first entered into. As such it was unenforceable, as were any statutory rights dependent on it. Notwithstanding this, the claimant asserted that she had been the victim of human trafficking and that the tribunal should, in the spirit of the European Convention on action against trafficking in human beings, provide her with a remedy. The tribunal rejected this - it had no jurisdiction or powers in that regard. The EAT agreed with the tribunal on both points.

Nor could her claim for race discrimination succeed. Her treatment was not because she was Indonesian, but because she was in the UK illegally and without a work permit.

7: Service provision change and TUPE - "assignment" to an "organised grouping of employees".

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In deliberating whether there has been a service provision change under Reg 3(1)(b) of TUPE 2006 is it sufficient to say that employees will transfer if, simply, they "go with the work"? Not so says the EAT in **Eddie Stobart Ltd v Moreman**. Instead, there needs to be an analytical distinction between an organised grouping of employees (TUPE Reg (3)(a)) on the one hand and, on the other, whether employees are assigned (Reg 4(1)) to it.

ES is a warehousing and logistics service provider. It had 35 employees at one site in Nottinghamshire servicing at least 5 clients. The contracts reduced to 2, the principal one relating to Vion. ES closed the site. FJG Logistics Ltd up picked up the Vion work. ES took the view that all employees engaged wholly or 50% plus their time on work should transfer to FJG.

The EAT held that it is necessary to identify an organised group of employees in advance of the question of which employees were assigned to it. Here, the employees were "organised" as to their shifts, not as to a particular customer. A paradigm example of an organised grouping of employees would be where there was a particular client "team" dedicated to the client. Such was not the case here.

8: Can a change of location on a TUPE transfer give rise to a claim for constructive, automatically unfair, dismissal?

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The 5 claimants in **Abellio London Ltd v CentreWest London Buses Ltd** worked for CentreWest, which ran the 414 bus route operated from its Westbourne Park depot. This location suited the employees' family circumstances, and where they lived. The route was transferred to Abellio. It intended to operate the route from its own depot in Battersea. It was accepted by the parties that this was a service provision change, and therefore a relevant transfer, under Reg 3(1)(b) of TUPE.

The claimants all had objections to the new location. It affected their travel and domestic arrangements. The new location would mean between 1 and 2 hours extra travelling per day. They resigned. It was held by the employment tribunal that there had been a substantial change to the employees' working conditions to their material detriment under Reg 4(9) of TUPE. The move was additionally a repudiatory breach of contract (in that a mobility clause in the employment contract did not extend to the Battersea location). Therefore the employees were also constructively dismissed for the purposes of Reg 4(11) of TUPE. It followed that the dismissals were automatically unfair, being by reason of the transfer.

The EAT agreed, citing with approval the EAT decision on the same point in *Tapere v South London and Maudsley NHS Trust* [2009] IRLR 972.

9: Post-transfer dismissal to introduce new contracts was not automatically unfair.

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In *Addison v Community Integrated Care* (Case Number 2507729/11) the issue for the employment tribunal was whether the sole or principal reason for the dismissal of the claimants was a transfer of an undertaking or a reason connected with such a transfer and, therefore, whether the dismissals were automatically unfair by virtue of Regulation 7 of TUPE.

The claimants worked for an organisation engaged in the provision of social care to vulnerable clients. This service was funded by way of a service contract with Cumbria County Council. The claimant's previous employment had been with West Cumbria NHS Trust when they were employed on NHS terms and conditions of employment. They transferred, under TUPE to CIC in 1996 and continued on their NHS terms and conditions. However, in January 2011 Cumbria County Council informed CIC that its costs to the County Council were too high and unless the service could be provided at a reduced cost the County Council would have to put the service contract between them out to re-tender. CIC therefore considered a number of savings measures that could be made. The single largest saving that could be made would be to move the claimants who were protected on NHS terms and conditions to the same conditions as their other 109 employees. Negotiations ensued but agreement could not be reached with the employees. To achieve the objective of putting the claimants on to new contracts they were dismissed from their existing contracts and at the same time offered continued employment on the new contracts.

The claimants claimed unfair dismissal asserting that the sole or principal reason for the dismissal was the transfer itself or a reason connected with it. The employment tribunal accepted that the transfer provided the background or context for the dismissals (in that had the claimants not been employed by CIC on the protected NHS terms and conditions of service they would probably not have been dismissed). But, according to the employment tribunal that was not the sole or principal reason for the transfer. Applying the decision of the EAT in *Smith v Trustees of Brooklands College* (EAT/0128/11) the "but for" test was not applicable. The question was what was the reason, what caused the employer to dismiss. The tribunal found on the facts that the sole or principal reason for the dismissals was the employer's need to make financial savings in order to retain the Cumbria County Council contract and although mere passage of time would not necessarily destroy the causal link between the transfer and the dismissal, in this case the employer's need to make the financial savings amounted to a supervening event some 15 years after the transfer and had to be placed also in the context of the employer putting in place other cost saving measures. It followed, therefore that the dismissal was not automatically unfair under Regulation 7 of TUPE.

10: TUPE - time of transfer and duty to invite employees to elect representatives.

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Two separate legal points were considered by the EAT in **Commercial Motors (Wales) Ltd v Howley**. The first was the time of a transfer of an undertaking. The claimant was dismissed on 3 February 2009 but completion of the sale under the legal transfer documentation occurred later, in March 2009. The question was whether there was a transfer of the claimant's employment contract under TUPE to the transferee by the date of dismissal. The claimant was employed by Commercial Motors (Newport) Ltd (Newport). An agreement for sale of its business was reached with Commercial Motors (Wales) Ltd (Wales). A conditional sale agreement was entered into on 24 December 2008 the conditions being conclusion of a lease and the purchaser obtaining bank financing for the purchase price of the business. As at 2 February 2009 the financing had been arranged but the property arrangements had not. The claimant was dismissed on 10 February 2009. The remaining condition under the sale agreement was satisfied subsequent to this and completion took place on 6 March 2009. Wales contended that completion of the transfer did not take place until 6 March 2009 and therefore there could be no transfer until that time. In fact Wales had taken over the running of Newport's business with effect from 2 February 2009. As the employment tribunal explained, this was not a case of the transferee waiting for completion of the sale to take place before taking action in respect of running of the transferred business. Therefore irrespective of the legal sale documentation the transfer took place prior to the claimant's dismissal and the claimant were under responsibility for that dismissal lay with Wales. This conclusion is consistent with the European court's view in *Berg & Busschers v Besselsen* [1989] IRLR 447 that

> "… if the purchaser of an undertaking becomes the employer… the transfer must be considered as the transfer of an undertaking as a result of the legal transfer within the meaning of Article 1(i) of the Directive, even if the purchaser only acquires the ownership of the undertaking at the moment he has paid the completed purchase price".

The European Court repeated this advice in *Celtec v Astley* [2005] IRLR 647 in terms

> "It has been held on several occasions that Directive 77/187 applies where there is a change in the legal or natural person who is responsible for carrying on the business regardless of whether or not ownership of the business is transferred".

The case of *Wheeler v Patel* [1987] ICR 631 in which the view was expressed that the transfer took place on completion was a fact specific decision where the contract of sale and completion took place on the same day and there was no question of the new owners taking over or running the business prior to completion. The case illustrates that parties should be aware that moving into possession and control of the business will trigger the TUPE transfer even if this is at a date earlier than that specified in the legal transfer documentation.

The second point concerned the obligation to inform and consult with employee representatives under Regulation 13 of TUPE. The employment tribunal had found a clear breach of Regulation 13 in that a specific decision had been taken by both transferor and transferee that employee would not be informed of the matters set out in Regulation 13(2). It was held, if this were not clear already (see *Howard v Millrise Ltd* [2005] IRLR 84; *Hickling v Marshall* (EAT/0217/10)), that there is always an implied obligation on the part of an employer to invite employees to elect employee representatives breach of which obligation can trigger liability under Regulation 13.

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