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Employment Law BULLETIN

Welcome to our April employment law bulletin.

April 6th marked some significant changes in employment law and employment tribunal procedure and our case summaries include topics as diverse as social media, redundancy and TUPE.

May I remind you of our forthcoming events:

Click any event title for further details.

Absence Management: The Practicalities

- HR Workshop, 15th May 2012.

Annual Employment Law Update for Charities

- Full Day Seminar, 14th June 2012.

The Employment Relationship: Managing Change

- Breakfast Seminar, 7th August 2012.

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Click on any of the headings below to read more

4: What is the trigger point for the duty to inform and consult about collective redundancies?

5: The word "workforce" in the expression "economic, technical or organisational reason entailing changes in the workforce" in Regulation 7(2) of TUPE does not include corporate franchisees.

6: Is there a service provision change under Reg 3(1)(b) of TUPE when the service is conducted in a fundamentally or essentially different manner following the changeover?

7: In the absence of a relevant TUPE transfer, can an individual's employment transfer from one employer to another without the employee's consent?

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

1: BIS call for evidence on simplification of dismissal procedures and "compensated no-fault dismissal" for micro-businesses

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The Department for Business, Innovation and Skills (BIS) has issued a call for evidence seeking views on two measures to address concerns that dismissal procedures could be too onerous, particularly for smaller organisations.

First, views are sought on whether the ACAS Code of Practice on discipline and grievance could be made more accessible and easier to use by small organisations. The Australian Small Business Fair Dismissal Code is suggested as an alternative that might be successfully applied in the UK.

Secondly, the much anticipated thinking on compensated no-fault dismissals for "micro-businesses" (ie those with fewer than 10 staff) has been published. If implemented, compensation for a no-fault dismissal would only prevent an employee from bringing an unfair dismissal claim, not any other type of claim (such as discrimination) arising out of their dismissal. The call for evidence may be accessed using the link below. The call for evidence closes on 8 June 2012.

http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-626-dismissal-for-micro-businesses-call

2: Changes in employment law coming into effect in April 2012

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A number of changes in employment law and tribunal procedure came into effect on 6 April 2012. In brief they are as follows.

Unfair dismissal

The qualifying period for unfair dismissal increased from 1 year to 2 years. However it is important to note that this only affects employees whose employment starts on or after 6 April 2012. Those employees who have already accrued 1 year's service or who, being appointed before 6 April 2012 are in the process of accruing it will be able to rely upon the previous 1 year qualifying period.

Employment tribunal procedure

Deposits
The maximum deposit a tribunal will be able to order a party to pay if their claim has little reasonable prospects of success will increase from £500 to £1,000

Costs Awards
The maximum amount of costs an employment tribunal can award (without referring the case to the county court for a detailed assessment) will increase from £10,000 to £20,000.

Witness statements
Where witness statements are used they will stand as evidence in chief and taken "as read" at the hearing, unless the judge or tribunal directs otherwise.

Witness expenses
State funded witness expenses are to be withdrawn. Tribunals will have the power to direct parties to

bear the expenses of any witness. The Government will withdraw state funded expenses.

Judges to sit alone on unfair dismissal cases
Unfair dismissal cases will be heard by a judge sitting alone without lay members unless the judge orders otherwise. This will be reviewed after one year.

Statutory payment rates

From April 2012 the standard weekly rates will increase for the following payments:

- Statutory maternity pay, statutory paternity pay and statutory adoption pay: these will increase on 1 April 2012 from £128.73 to £135.45 and the weekly earnings threshold will rise from £102 to £107
- Statutory sick pay: this will increase on 6 April 2012 from £81.60 to £85.85, while the weekly earnings threshold will rise from £102 to £107
- Maternity allowance: this will increase on 9 April 2012 from £128.73 to £135.45

3: Employee fairly dismissed for posting comments about a colleague on Facebook

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In *Teggart v TeleTech UK Limited* (NIIT 00704/11) the industrial tribunal in Northern Ireland held that an employee who posted obscene comments about a colleague on his Facebook page was fairly dismissed by his employer.

The vulgar comments concerned were about the alleged promiscuity of a female colleague. Although the comments did not bring the employer's reputation into serious disrepute, the harassment of a colleague was sufficiently serious on its own to justify the dismissal of the employee for gross misconduct. Furthermore, having made his comments public, the employee had no reasonable expectation of privacy for the purposes of Article 8 of the European Convention on Human Rights.

4: What is the trigger point for the duty to inform and consult about collective redundancies?

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This must be determined by the national court in the light of the European Court's guidance on Directive 98/59, says the Advocate General's Opinion in ***USA v Nolan***.

This case was referred to the CJEU by the Court of Appeal. It concerned a claim on behalf of civilian employees at a US military base in the UK that they had not been consulted soon enough when, on a decision to close the base, this led to multiple redundancies for the purpose of s 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The decision to close the military base had been made by the Secretary of the US Army in September 2006. The British authorities were informed in April 2006. The commanding officer informed the workforce at that time. Consultation about redundancies did not commence until 5 June 2006.

Advocate General Mengozzi opined that an employer who is contemplating collective redundancies must begin consultations with the workers' representatives in good time with a view to reaching an agreement. In *Akavan Erityisalojen Keskusliitto AEK ry and others v Fujitsu Siemens Computer Oy* (Case C-44/08; [2009] IRLR 944) the Court stressed that the obligation should not be triggered prematurely.

Akavan and *Nolan* concerned cases where the employer who is proposing a strategic or operational decision about closure (in *Nolan*, the US Army) is in all probability not the same as the employer who is proposing consequential redundancies (in *Nolan*, the commanding officer of the base).

The Directive should therefore be interpreted as meaning that an employer's obligation to conduct consultations with workers' representatives arises when a strategic or commercial decision which compels him to contemplate or to plan for collective redundancies is made by a body or entity which controls the employer.

It is for the referring court to identify when a strategic decision which exerted such a compelling force on the employer, for the purposes of giving effect to the consultation obligation, occurred.

5: The word "workforce" in the expression "economic, technical or organisational reason entailing changes in the workforce" in Regulation 7(2) of TUPE does not include corporate franchisees.

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In ***Meter U Ltd v Ackroyd*** the claimants were employed as meter readers who transferred from N Power Yorkshire Limited to Meter U. In another conjoined case the claimants were transferred from G4S Utility Services UK Limited to Meter U. The former were called the Ackroyd claimants and the latter the Hardy claimants. They were employees of their former respective employers until their transfer to Meter U. Meter U carried on its business of meter reading services by means of franchises with independent franchise limited companies, typically owned by individual meter readers. In fact, Meter U does not employ meter readers. Its only employees are about 20 administration staff.

Both sets of claimants were offered the opportunities of forming franchise companies in accordance with Meter U's practice but none did so. Their employment was then terminated on ground of redundancy. Redundancy payments were made but claims for unfair dismissal were also brought.

The question was whether the sole or principal reason for the dismissals was the transfer or a reason connected with the transfer. Both employment tribunals considered that the dismissals were for a reason connected with the transfer, a matter which was not the subject of the appeal to the EAT. The question was whether the reason was an economic, technical or organisational reason entailing changes in the workforce within the meaning of Reg 7(2) of TUPE. The claimants contended that the term "workforce" included franchisees as well as employees. If so, there would be no reduction in the workforce on the dismissal of the employees and Regulation 7(2) would not apply. The employers contended that the change of contractual arrangements from employment to franchise was an economic, technical or organisational reason entailing changes in the workforce. "Workforce", the employer said, did not extend to the workforce of third party franchise companies to which meter reading had been contracted. The EAT held that, applying an ordinary common sense use of the word "workforce", it did not include limited companies. These have an identity separate from their directors or controlling shareholder. In its judgment, changes in numbers of employees or in their duties are *not* the only changes which may constitute "changes in the workforce" within the meaning of Regulation 7(2) of TUPE. Unless the employer's franchise business model was a sham, on its proper construction, "workforce" did not include the limited companies and on dismissal there was a reduction in the workforce and therefore a change in the workforce.

The case has raised some eyebrows but two points are to be noted. First, the EAT's judgement is predicated on the assumption that the franchise business model was not a sham and, secondly, the EAT expressed no opinion on whether a change of status for example from employee to independent contractor was a change in the workforce within the meaning of Regulation 7(2).

6: Is there a service provision change under Reg 3(1)(b) of TUPE when the service is conducted in a fundamentally or essentially different manner following the changeover?

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No, says the EAT (Langstaff P) in ***Johnson Controls v UK Atomic Energy Authority***, but this is a question of fact in each case and requires an holistic assessment by the employment tribunal.

The claimant was a taxi administrator employed by Johnson Controls, which provided a taxi administration service for its client, United Kingdom Atomic Energy Authority. UKAEA then terminated this arrangement and took the activity of booking taxis in-house. Instead of using a taxi service administrator, it decided its secretaries could book taxis directly with taxi firms. Booking taxis no longer existed as a centralised service.

The Employment Judge held that, as a consequence, the services carried out after the change were essentially different from those carried out before and there was no TUPE transfer. The EAT upheld this decision, applying the guidelines set out by Judge Peter Clark in *Enterprise Management Services Ltd v Connect-Up Ltd* (EAT/0462/10). The process of defining the activities involved, and whether they remained the same, involved a question of fact for the employment tribunal, which was to be trusted to make that assessment.

We tend to forget that in 2005 the Government's public consultation document on what became the TUPE Regulations 2006 considered that there should be a relevant TUPE transfer by way of service provision change even where the service is to be provided in the future in a new or innovative manner (see para 27). But, contrary to this aspiration, recent EAT decisions, of which *Johnson Controls* is the latest, suggest there will be no service provision change under Reg 3 (1) (b) when the service is significantly re-modelled.

7: In the absence of a relevant TUPE transfer, can an individual's employment transfer from one employer to another without the employee's consent?

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No, says the EAT in ***Gabriel v Peninsula Business Services***.

The Claimant was employed by Peninsula as a marketing consultant. Peninsula purchased the shares of a company later known as Taxwise Services Ltd. The Claimant was moved to Peninsula's "Taxwise Department" and on to the Taxwise payroll, but ostensibly remained employed by Peninsula.

An email was then sent, stating that the trade and assets of Peninsula's Taxwise business were to be transferred to

Taxwise Services Ltd, along with the employee's employment contract. The Claimant did not receive the email and was otherwise unaware of the purported change of employer. The Claimant then brought sex and race discrimination claims against both companies. For the purposes of compliance with the now repealed statutory grievance procedure and limitation issues (the details of which need not concern us here) the identity of the true employer was important. In essence, for her claim to succeed against Peninsula, as well as Taxwise, she had to show she remained employed by Peninsula over the relevant period.

The EAT (overruling the employment tribunal) applied the House of Lords authority of *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 to the effect that, at common law, the employment of an employee cannot be transferred from one employer to another without the consent of the employee. Peninsula therefore remained her "general employer", and the claim against Peninsula could therefore proceed.

It is important to note that TUPE was not pleaded by the employer. If TUPE had applied, the statutory doctrine of automatic transfer of employment would of course have been engaged, subject only to the employee's right to object to the same under Reg 4 (7) of TUPE.

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