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1: Can there be a redundancy where the headcount remains the same?

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In certain circumstances, yes, says the EAT in *Packman v Fauchon*.

The claimant was employed as a bookkeeper. There was a downturn in business. Also the employer introduced an accountancy software package that reduced the number of hours that it was necessary for the bookkeeper to work. Accordingly, it sought to persuade the claimant to cut down her hours. She refused and was dismissed.

The employment tribunal held that the downturn in business meant there was a diminishing need for bookkeeping. Since the claimant did not agree to a significant reduction in her hours, the reason for her dismissal was redundancy. This analysis is consistent with an early, Divisional Court, decision in Hanson v Wood [1967] 3 KIR 231.

But in a later, unreported, EAT decision in Aylward v Glamorgan Holiday Home Ltd (EAT/0167/02,) it had been suggested that there must always be a reduction in the headcount of employees for redundancy to apply. Aylward has, however, always been doubted, notably by the learned editors of Harvey on Industrial Relations and Employment Law. The employment tribunal took this into account and decided not to follow Aylward.

The employer appealed, relying upon the Aylward case, which, it contended, bound the employment tribunal. The EAT rejected the appeal, departing from Aylward and noting Harvey's criticism with approval.

So if the amount of work available for the same number of employees is reduced then a dismissal of an employee caused wholly or mainly for that reason is a redundancy.

2: Can a national law provide for retirement of employees at the age of 67 without taking into account the level of the retirement pension available to the person concerned?

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Yes, says the CJEU in *Hörnfeldt v Posten Meddelande AB*

Swedish law provides for the so-called "67 year rule". Under that rule every employee enjoys an unconditional right to work until the last day of the month of his or her 67th birthday on which date the employment contract can be terminated. Pensions in Sweden are based on career average earnings. Mr Hörnfeldt worked for the Postverket (postal services agency) for various periods on fractional contracts and, when retired, he had an inadequate pension.

Mr Hörnfeldt maintained that if he had been allowed to work for 2 or 3 years longer his retirement pension would be significantly increased. Therefore, he argued, an exception to the 67 year rule ought to be allowed in respect of workers who, like him, wish to

continue to work.

The court ruled against him. The 67 year rule was not a mandatory scheme of automatic retirement. It simply laid down the conditions under which an employer could derogate from the principle of age discrimination by giving notice to workers aged 67. Nothing would prevent a worker and an employer entering into a new fixed term contract and finally, those persons whose pension was low could receive other support benefits.

Accordingly, the Equal Treatment Directive did not preclude national law from allowing an employer to terminate an employee's employment contract on the sole ground that he had reached the age of 67, notwithstanding that it did not take into account the level of the retirement pension which the person concerned would receive. Of course this is subject to the proviso that the retirement age must be justifiable. That means it must be objectively and reasonably justified by a legitimate aim relating to employment policy and labour market policy and constitutes an appropriate and necessary means by which to achieve that aim.

At a time when the abolition of the UK default retirement age still remains controversial, this case is highly relevant to the debate.

3: Fundamental review of employment tribunal rules

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Last year the Government asked Mr Justice Underhill, the outgoing President of the Employment Appeal Tribunal, to undertake a fundamental review of the Employment Tribunals Rules of Procedure (currently contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004) (SI 2004/1861).

The terms of reference for the review were to ensure that robust case management powers can be applied flexibly, effectively and (in so far as is practicable) consistently with individual cases.

Mr Justice Underhill has concluded his review, made his recommendations and provided new draft rules. Click here to read the Review and the Rules.

The key points are as follows

- The rules have been redrafted and are less than half the length of the old rules
- It is recommended that there be an initial "sift stage" at which every claim will be reviewed by an employment judge on the papers after the claim form and the employer's response have been received. Consideration will be given at the sift stage to what directions are required for hearing and also to whether or not claims or responses should be struck out
- Case management discussions and pre-hearing reviews will be combined into a renamed preliminary hearing
- A new rule will allow tribunals to set timetables for all evidence and submissions and to enforce them by guillotines where necessary
- The rules on restricted reporting and anonymity will be made more flexible, allowing judges to strike a better balance between open justice and freedom expression on the one hand, and privacy and effective justice on the other
- It is proposed that the limit (currently £20,000) beyond which costs awards have to be referred to the County Court for detailed assessment will be abolished, allowing

employment judges to conduct those assessments
- A change in the withdrawals process would mean that when a party withdraws their claim the other party does not have to apply to get the claim dismissed
- New forms ET1 and ET3 will be drafted

4: Fees in employment tribunals

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On 13 July 2012 the Ministry of Justice published the results of its consultation on the introduction of employment tribunal fees. Click here to read the full response. The following is a summary of the changes,

Claims before employment tribunals are categorised either as level 1 claims or level 2 claims. Level 1 claims, which are supposedly straightforward matters, include unpaid wages, payment in lieu of notice and redundancy payments. For these there will be an issue fee of £160 and a hearing fee of £230.

Level 2 claims are more significant cases including unfair dismissal, discrimination, equal pay and claims under the Public Interest Disclosure Act. Here the issue fee will be £250 and the hearing fee £950.

There are increased fees for multiple claims. There will also be fees for certain applications such as to review a default judgement (£100), an application to dismiss following settlement (£60) and judicial mediation (£600). It will cost £400 to lodge an appeal to the EAT and £1,200 for a hearing before the EAT.

The changes are intended to be in force from Summer 2013.

5: For a service provision change under TUPE the client for whom the services are provided must remain the same

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Under Regulation 3(1)(b) of TUPE a service provision change occurs when activities cease to be carried out by one person on a client's behalf and are instead carried out by another person on *the* client's behalf (emphasis added).

In *Hunter v McCarrick* [2010] IRLR 274 the EAT held that the client for whom the services are provided must remain the same. So, in that case, where a management services contractor providing services for a property was replaced by a new management services company engaged by the purchaser of that property there was no service provision change as the client (the owner of the property) had also changed.

This case has been followed by *Taurus Group Ltd v (1) Crofts (2) Securitas Security Services (UK) Ltd*. In this case the facts were that Crofts was employed by Reliance Security Services Ltd (now known as Securitas Security Services Ltd). Reliance provided security services for a student accommodation building in Nottingham. The property was sold and the new owner replaced Reliance with another security company, Taurus. Taurus refused to take Mr Crofts on. Mr Crofts argued that there was a service provision change and that for these purposes the client for whom the services were provided did not have to remain the same. Otherwise this would undermine the purpose of TUPE, to

protect employee rights. The employment tribunal agreed and found there was a TUPE transfer.

However, appellate authority such as *Metropolitan Resources Ltd v Churchill Developments (in liquidation)* [2009] IRLR 700 suggests that there is no need to apply a purposive construction to the new statutory concept of a service provision change because the service provision change rules are not in the Acquired Rights Directive. Therefore there should be a straightforward and common sense interpretation of the statutory wording.

In *Hunter v McCarrick* the EAT followed this precept by ruling that on service provision change "the client" in Regulation 3(1)(b) had to remain the same. In *Taurus Group* the EAT therefore felt obliged to follow *Hunter* and ruled the conditions for a service provision change were not satisfied. No claim lay against Taurus, the new security company.

6: The Nuttall Review of Employee Ownership

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The Nuttall Review was published in July 2012. It surveys existing research literature on the benefits of employee ownership. It identifies key barriers to employee ownership and makes a number of recommendations on how to deal with these barriers.

The report identifies the 3 key barriers to the further uptake of employee ownership in the private sector as a lack of awareness, a lack of resources and the complexity of employee ownership.

As far as awareness is concerned both the Government and the sector should, the report says,

- promote a clearer identity for employee ownership as a business model in its own right
- build on work by the Government and the sector to ensure that employee ownership is regarded as an option at more stages of the business life cycle and
- create a new right to request employee ownership, aimed at encouraging employees and their employers to discuss employee ownership proposals

Resources should be increased by

- A sector led institute for employee ownership
- Better promotion of the various sources of finance suitable for employee owned companies

The Government should make it easier to set up and run employee owned companies by

- Creating simplified "off the shelf" models of an employee owned company
- Simplifying the processes underlying operating an employee owned company
- Reviewing other regulations and tax policy to ensure complexity is minimised

There should also be measures to ensure implementation and maintain progress by

- A one year on report to monitor progress
- A sector steering group to advise the Minister on the views of the employee

ownership sector

This follows the publication on 4 July 2012 of the BIS commissioned report by Cass Business School on *The Employee Ownership Advantage: Benefits and Consequences* and the Government's response to the consultation on *Building a Mutual Post Office*.

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