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JULY 2017

Employment Law BULLETIN

Welcome to our July employment law bulletin.

In this issue we discuss some really interesting developments covering various strands of employment law and practice.

11th July 2017 saw the publication of the long awaited report by Matthew Taylor, Chief Executive of the RSA, on the impact of modern working practices and the so-called "gig economy" on businesses and the rights of individuals engaged by them.

In *Chesterton Global Ltd v Nurmohamed* the Court of Appeal has considered the circumstances in which it will be reasonable for a worker to believe that a qualifying disclosure is made in the public interest. The requirement for the disclosure to be in the public interest was introduced in 2013. It was designed to disapply the protection for whistleblowers where their complaint is essentially just about a breach of their own employment contract. In this definitive ruling the Court of Appeal gives some examples of factors which may assist employment tribunals in deciding what may reasonably considered to be in the public interest.

In *Anglo Beef Processors UK v Longland* the EAT has considered the requirement that, for a service provision change TUPE transfer, the activities taken over by the new provider must remain "fundamentally the same" as before the transfer. In this particular case the EAT considered that the employment tribunal was entitled to conclude that, notwithstanding a change from manual processing of activities to electronic processing, the activities changing hands remained fundamentally the same.

In *Brighton & Sussex University Hospitals NHS Trust v Akinwunmi* the EAT has upheld an employment tribunal's decision that an absence dismissal was unfair because of a dysfunctional working environment that the employer had failed to correct.

In *Mrs M Williams v Meddygfa Rhydbach Surgery & Others* an employment tribunal has found that an employee was constructively unfairly dismissal when she was bullied during a mismanaged performance management process.

In *Luís Manuel Piscarreta Ricardo v Portimão Urbis, E.M., SA, in liquidation and others* the European Court has discussed important issues under the EU Acquired Rights Directive arising from a decision by local council in Portugal to wind up its trading company and continue its activities by other means.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Disability Discrimination: avoiding the pitfalls

• Breakfast Seminar, Leeds, 1st August 2017 **SEMINAR NOW FULL**

Our next breakfast seminar

• Breakfast Seminar, Leeds, 17th October 2017 **SAVE THE DATE!**

In conjunction with ACAS

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

• A full day conference, Hull, 9th August 2017

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

• A full day conference,York, 6th September 2017

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1: Taylor report on modern working practices published

The long-awaited report by Matthew Taylor, Chief Executive of the RSA, on the impact of modern working practices and the so-called "gig economy" on businesses and the rights of individuals engaged by them was published on 11 July 2017. The report is available here.

The report sets out a recommended policy direction, advocating a focus on "good work", rather than simply on the quantity of available work. It proposes that there should be stronger incentives for employers to treat those who work for them fairly and transparently. It also recommends that there should be greater opportunity for people to improve their skills and career prospects, rather than staying for extended periods on the National Minimum Wage. Employers should also be encouraged to be more proactive about promoting workplace health and to take more steps to facilitate an employee's return to work after ill health.

The new mode of online "platform" working, where, for example, a taxi driver or courier logs onto an online app and is connected with customers, is accepted as having a role in modern society. This is often referred to as part of the "gig economy". However, the report recommends that steps are taken to protect the rights of those working for such platforms.

The report recommends that workers who do not qualify as employees should be renamed "dependent contractors" and should receive workers' rights such as holiday pay and NMW. The extent to which an individual is controlled by a business should be key to determining whether someone is a dependent contractor and this consideration should be more important in tribunal than whether the individual has to provide the service personally.

- A number of recommended changes designed to make determining and enforcing employment rights more stream-lined are set out in the report. Among these are:
- To abolish the hearing fee for preliminary hearings to determine employment status and to fast-track such hearings. The burden of proof in these hearings should be on the employer to show that the individual is not entitled to the rights claimed.
- HMRC to enforce rights such as holiday pay, NMW, sick pay and unlawful deductions from wages on behalf of the lowest paid workers.
- Decisions on employment status to be applied across both tax law and employment law regimes.
- To establish a free online employment status tool to assist individuals and businesses.
- To adapt the NMW "output work" rules for those working for online platforms.
- NMW to be paid at a higher rate for any hours worked which are not guaranteed by the contract. This would incentivise employers to make contractual hours reflect the reality of the number of hours actually worked.
- Workers on a zero hours contract to have a right to request guaranteed hours after 12 months. Businesses above a certain size to be required to report how many requests they have received and how many requests have been agreed to.
- Continuity of employment not to be broken for casual worker contracts unless there is a gap of at least one month (rather than the current period of a week).
- The pay reference period for calculating average pay (in holiday pay calculations) to be 52 weeks (rather than 12 weeks).
- Workers to have the right to request rolled up holiday pay but safeguards to be in place to ensure that people actually take their holiday leave.

- Statutory sick pay rights to accrue in the same way as holiday entitlement (rather than being a right based on National Insurance Contributions (NICs) and earnings-based eligibility).
- Agency workers to have the right to request a direct employment contract with the end user after 12 months of engagement. Larger businesses to be required to report the number of requests received and how many have been agreed.
- Employee engagement and consultation to be strengthened. For example, the Information and Consultation of Employees Regulations 2004 to be amended so that they protect both employees and workers and so that employer obligations are triggered if 2% (rather than 10%) of the workforce make the request.
- Increase NICs for the self-employed and allow the self-employed to have the same state benefits as employees and workers.
- Extend the opportunity for auto-enrolment in a pension to the self-employed.
- Use digital payment systems to eliminate cash-in-hand payments and illegal working.

The report has had a mixed reception from business, labour and academics. Some commentators consider the idea of a new kind of "worker" (to be known as a "dependent contractor") just adds another unnecessary layer of complexity. TUC General Secretary Frances O'Grady said: "It's no secret that we wanted this review to be bolder. This is not the game-changer needed to end insecurity at work".

2: Court of Appeal rules on whistle-blowing public interest test

Workers who raise concerns about their employer failing to comply with a legal obligation and who reasonably believe that the disclosure is made in the public interest are protected from being subjected to a detriment because of making the disclosure. The public interest test for a qualifying disclosure was only introduced into the legislation in 2013. It was designed to disapply the protection for whistleblowers where their complaint is essentially just about a breach of their own employment contract.

In ***Chesterton Global Ltd v Nurmohamed,*** the Court of Appeal has considered the circumstances in which it will be reasonable for a worker to believe that a disclosure is made in the public interest.

Mr Nurmohamed was a senior manager of a branch of Chestertons. He raised concerns to two directors that the company was passing deliberately inaccurate figures to its accountants in order to lower the amount of profit-based commission payable to around 100 senior managers. Mr Nurmohamed was subsequently dismissed. This indeed, at first glance, looks like a simple complaint about a breach of an employment contract.

But he brought claims in an employment tribunal, including automatic unfair dismissal, on the basis that he had been dismissed for making a protected disclosure. An employment tribunal upheld his claim, stating that the disclosure affected a fairly large number of employees and so could reasonably be believed to have been in the public interest. The EAT agreed, pointing out that the question is not whether the disclosure was in the public interest but whether the worker subjectively believed that it was and whether that belief was objectively reasonable.

The Court of Appeal agreed with the lower courts. It made clear that there may be a range of reasonable views about whether a disclosure is in the public interest and that a tribunal should not substitute its own view. It commented that the actual reasons for the worker believing the disclosure to be in the public interest should not be the focus of analysis. The tribunal may find a belief to be objectively reasonable based on factors which were not in the mind of the worker. The Court of

Appeal also stated that a worker need not be motivated by the public interest to make the disclosure. As long as the worker reasonably believes that making the disclosure is in the public interest, the worker can be motivated entirely by self-interest.

The Court of Appeal refused to broaden the definition of public interest to cover any disclosure where the interests of someone apart from the discloser are affected (as suggested by Public Concern at Work, which had intervened in the case). However, Lord Justice Underhill expressed his expectation that tribunals will have a cautious approach to cases where a breach of the employment contract affects only those within an organisation. In this he was mindful of parliament's intention in amending the legislation to include the public interest test: "that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle-blowers".

The judgment cites with approval a number of factors which may assist tribunals in deciding whether a worker's belief that a disclosure is in the public interest was reasonable: the size of the group of people affected by the alleged wrongdoing; the importance of the interest affected; whether the wrongdoing is deliberate or accidental; and the size or prominence of the organisation alleged to have done wrong.

Employers need to be aware of the rules protecting employees who make protected disclosures. A claim based on detriment, including dismissal, for making a protected disclosure does not require a qualifying period of employment before the claim can be brought.

3: TUPE and Service Provision: Service Provision Change

In order for there to be a service provision change TUPE transfer under regulation 3(1)(b) of TUPE the activities taken over by the new provider must remain "fundamentally the same" as before the transfer. The EAT has recently stressed that a common sense and pragmatic approach must be taken to the meaning of the word "activities", and its decision in *Anglo Beef Processors UK v Longland* UKEATS/0025/15/JW is the latest example of this.

Mr Longland was employed by Meat & Livestock Commercial Services Limited as a carcase service officer. This meant classifying carcases in an abattoir. His employer provided these services to Anglo Beef Processors UK under a commercial services agreement. Mr Longland's duties involved identifying and weighing carcases, recording information, marking carcases and making sure they were classified properly in accordance with statutory regulations. Although this involved manual classification his employer had used a VIA (video imaging analysis) machine for some time. This enabled Mr Longland to carry out some of his duties with the assistance of the VIA machine although it was not fully using computer software analysis at this time. In 2014 Anglo Beef informed MLCSL that it would be moving over to full electronic classification of carcases and would be terminating its agreement with MLCSL accordingly. In other words it took the service back in house.

Anglo Beef now intended to make the assessment of carcases using the computerised assessment which the VIA machine was capable of producing. However some manual input was still necessary. The machines still needed calibrating every morning. A physical check was also necessary. Other aspects of the operation also required a person or persons to be present. If, for example, the machine missed a carcase then a qualified person would be called on to manually classify the carcase.

The question was whether Mr Longland should transfer to Anglo Beef under TUPE which the latter disputed. The employment tribunal however concluded that the activity which Anglo Beef had taken

over involved, essentially, classifying carcases, whether manually or electronically. The activity had been carried out by having two employees present at the processing line prior to the transfer and this practice was continued after the termination of MLCSL's contract. Furthermore the necessary BCC licence which Mr Longland held for the purposes of manual classification was required by at least one employee on the premises where electronic classification was being carried out. After the transfer a BCC qualified grader continued to be present on the line. The employment tribunal concluded that: "there was really very little room for doubt that the activities carried out by [Anglo Beef] after the transfer were fundamentally the same as that carried out by [MLCSL]".

Anglo Beef had also relied on the decision of the EAT in *Department for Education v Huke* UKEAT/0080/12. In that case the EAT decided that a tribunal ought to consider, in deciding whether "activities remained the same, not only the character and type of activities carried out but also the quantity, particularly where the contract post transfer involved a substantially reduced service. In such a situation TUPE might not apply. However the ET in Anglo Beef considered that the issue in *Huke* was that the claimant employee in that case was only carrying out the activities which transferred to the putative transferee for around 45% of his time prior to the transfer. The real issue in Huke was that there was really no activity to be transferred since there had prior to the transfer been a considerable downturn in work and long prior to the insourcing there had been little or no work on the activities insourced for the employee to do. But here the situation was different. There was no reduction in quantity as far as the activities previously carried out by Mr Longland were concerned. The ET made a specific finding that the processing of carcases continued as before with the same throughput rate of around 40 to 45 carcases per hour.

The EAT held that the ET was entitled to make these findings and adopted its reasoning. In short, there was a service provision change TUPE transfer and Anglo Beef's appeal was dismissed.

For more in-depth practical guidance on TUPE issues such as this please note our practical **TUPE training days** in conjunction with **ACAS** on August 9 2017 in **Hull** and 6 September 2017 in **York**.

4: Absence dismissal unfair because of dysfunctional working environment

In ***Brighton & Sussex University Hospitals NHS Trust v Akinwunmi,*** the EAT has upheld an employment tribunal's decision of unfair dismissal on the basis that the NHS Trust failed to take steps to improve the working environment (and consequent patient safety) in a neurosurgery department where the employee worked.

Mr Akinwunmi worked as a consultant neurosurgeon for the NHS Trust. The claimant had very poor relationships with a number of his fellow surgeons. There were historic complaints that the claimant had been bullied. The claimant had also previously brought a race discrimination claim in an employment tribunal which was settled. An internal investigation at this time recommended that there should be formal management training and that mediation should be considered in an attempt to improve working relationships in the team.

It was agreed that Mr Akinwunmi should take an unpaid three month sabbatical. During this break from work, the claimant raised concerns about patient safety in the department and alleged that his colleagues were turning away NHS patients while accepting private work. Colleagues also raised complaints against the claimant, including suggestions that he was incompetent and that his working practices were unsafe. A complaint was made to the police that the claimant had threatened to assault one of his colleagues. Although the police decided to take no action concerning these allegations, they were referred by a colleague to the General Medical Council.

A number of investigations were commissioned by the employer into the allegations by and about the claimant. Some of these made recommendations that the NHS Trust should take steps to improve working relationships in the interests of the efficient and safe running of the department. The employer did not take any of the recommended actions. Nor did the employer keep the claimant as well informed about the progress and outcomes of these reports as it did his colleagues.

Mr Akinwunmi appealed against the decision to limit his sabbatical to three months. His appeal was not upheld and from that point on his absence was considered to be unauthorised. The claimant argued that it was impossible for him to return to work given that there were a number of serious outstanding issues with his colleagues which could lead to risks to patient safety. He was also concerned that the police might arrest him if he returned to work given that he would come into contact with the colleague he was alleged to have threatened. (The employer had not told the claimant that the police had dropped the matter.) The NHS Trust argued that his complaints could not be dealt with unless he returned to work.

A disciplinary hearing was held and Mr Akinwunmi was dismissed because of his unauthorised absence. He brought claims for unfair dismissal, automatic unfair dismissal because of whistle-blowing and victimisation in the Employment Tribunal. The tribunal dismissed his claims for victimisation and whistle-blowing. But it found that his dismissal was unfair.

The EAT agreed. It held that the reason for the dismissal (unauthorised absence misconduct) was unfair because the full context of the absence was not taken into consideration by the employer. It was unreasonable of the employer to insist on the claimant's return to work before taking any steps to deal with outstanding issues and to improve working relationships. (The tribunal had found as a matter of fact that the claimant was totally isolated from his colleagues.) It was particularly unreasonable of the employer to insist on a return to work as this workplace was one in which people's lives could be dependent on good communication and the smooth running of the department. The EAT also noted that the tribunal found the employer's witnesses to be "disingenuous" when giving evidence.

This judgment recounts the long and sorry tale of a dysfunctional department. It should be noted that the tribunal's and the EAT's decision in this case was influenced by the clear link between the safety risk to critically ill patients and the poor working relationships of the surgeons in the team. However, all employers should note the importance of acting on recommendations to improve working relationships, for example in grievance investigation reports. Where relationships in the team continue to be unworkable and/or risky, the employer should carefully consider whether it is reasonable to insist on a return to work before taking such steps.

5: Employment tribunal case highlights the importance of appropriate performance management

In ***Mrs M Williams v Meddygfa Rhydbach Surgery & Others,*** an employment tribunal has found that an employee was constructively unfairly dismissed when she was bullied during a mishandled performance management process.

Mrs Williams was employed by the Meddygfa Rhydbach Surgery for nearly 30 years. Starting as a receptionist, she was promoted to practice manager after ten years and was well thought of by the doctors at the surgery at that time. The surgery went through a number of financial and personnel changes in 2009. After that time, Mrs Williams was not well regarded by the doctors and was considered to have been "over-promoted". One of the partners, Dr Smits, was reported to be very blunt with Mrs Williams and to shout at her on occasions.

A meeting was held with Mrs Williams in 2014 to discuss concerns about her performance. No management support or training was put in place following this meeting. Mrs Williams asked to be made redundant but she continued to be employed and a practice manager from another practice was seconded to assist her.

In 2015, the partners met with Mrs Williams. During this meeting, Dr Smits raised his voice and banged his hand against a door in frustration. Mrs Williams then took sick leave and brought a bullying complaint to the Health Board against Dr Smits. She later returned to work and raised a grievance with her employer. A grievance investigation was carried out and her grievance was not upheld. Mrs Williams resigned two days later on the basis of a breakdown in trust and confidence in her employer.

Mrs Williams brought an unfair dismissal claim in an employment tribunal. It found that she had been constructively unfairly dismissed. The tribunal found that she had not been properly performance managed and that she had been bullied. The employment judge commented that Mrs Williams had not been given the opportunity to improve in an environment “free from oppression”.

This is a first instance case and may be appealed. However, it is a useful reminder that employers should deal with performance issues in an appropriate way so that underperforming employees can be made aware of performance standards and expectations and given an opportunity to improve with support and training. A structured performance management process can assist in dealing with problems as they arise and ensuring that resentments and frustrations do not fester.

6: TUPE: Dissolution of local authority trading company and onward transfer of assets and activities

In *Luís Manuel Piscarreta Ricardo v Portimão Urbis, E.M., SA, in liquidation, Município de Portimão Emarp – Empresa Municipal de Águas e Resíduos de Portimão, EM, SA* (Case C-416/16) the European Court has discussed two important issues arising from a decision by a local council to wind up its trading company and continue its activities by other means. Was this a transfer of an undertaking within the meaning of the EU Acquired Rights Directive?

The Municipality Portimão is a local authority on the Algarve in Portugal. It had a trading company called Portimão Urbis. It employed Mr Piscarreta Ricardo as a director. Portimão Urbis was concerned with all manner of tourist matters, including street trading and cultural services. The Council, as principal shareholder of Portimão Urbis, decided to wind it up. Some of the activities were taken over by Portimão Council and the remainder of these activities were outsourced to Emarp (of which the Council was also the sole shareholder). There was an arrangement to transfer the staff to the Council and Emarp, but Mr Ricardo was not included in these plans. He was informed his employment would end on the final closure of Portimão Urbis. He therefore brought an action arguing that there had been a transfer of an undertaking from Portimão Urbis to Portimão Council and Emarp. A further complication was that he had been (at his request) on unpaid leave for the last three years. So even if there were a transfer of a business, was he in scope to transfer because of the suspension of his employment contract?

The transfer of undertakings point

The essential question was whether a trading company owned by local authority, which was wound up at the insistence of the local authority, which had assumed part of the services previously carried out by the trading company and outsourced others, was a transfer of an undertaking.

The essential distinction when considering transfers concerning public authorities is to examine whether there is a transfer of an economic entity (ie of an undertaking engaged in economic activities) or an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities. The first of these is a transfer of an undertaking. The latter two are not.

In Piscarreta Ricardo the Court usefully summarised the distinction between public sector transfers which are not covered by the Directive and those which are. Thus:

> "The Court has made clear in that regard that the notion of economic activity encompasses any activity consisting in offering goods or services on a given market. Activities which fall within the exercise of public powers are excluded as a matter of principle from classification as economic activity. However, services which are carried out in the public interest and without a profit motive and are in competition with those offered by operators who seek to make a profit may be classified as economic activities for the purposes of [the ARD]."

In the present case the court considered that the various activities engaged in by Portimão Urbis and taken over by Portimão Council and Emarp did not fall within the exercise of public powers, and so they were capable of being classified as economic activities for the purposes of the ARD. Nor did it matter that the transfer resulted from a unilateral decision of the local authority rather than a consensual transfer. Of course, said the Court:

> "It is necessary in this regard to consider all the facts characterising the transaction at issue in the main proceedings, including, in particular, the type of undertaking or business in question, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation."

This is a matter for the national court to determine.

The employee status point

The next question was whether a person such as Mr Ricardo, who was suspended and not actually performing his duties, was covered by the concept of "employee" within the meaning of the ARD and whether his employment contract should transfer to the transferee.

The Court noted that any person who, in the Member State concerned, is protected as an employee under national employment law is considered to be an "employee". That employment contract of course must exist at the date of the transfer. Whether there is a contract of employment in existence at the time of transfer must be assessed on the basis of national law, subject to the compliance with the mandatory provisions of the ARD concerning protection of employees from dismissal as a result of the transfer.

Under Portuguese national law, Portuguese legislation provides that whilst an employment contract is suspended, the rights obligations and safeguards of parties who are not required to be in active service are maintained. Therefore, said the Court, in such a case the ARD will protect an employee who is not actually performing his duties because his employment contract is suspended. But this would always be a matter for the national court to verify. Thus:

"…a person…who, because his employment contract is suspended, is not actually performing his duties is covered by the concept of "employee" insofar as that person is protected as an employee under the national law concerned…".

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