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Employment Law BULLETIN

Welcome to our June employment law bulletin.

This month we comment on a number of interesting cases.

For a service provision change TUPE transfer there must have been, prior to the change, an organised grouping of employees, the principal purpose of which was to carry out the relevant activities for the relevant client. In *Amaryllis Ltd v McLeod* the EAT considered that the principal purpose of any such organised grouping of workers must be assessed at the point immediately before the change of provider, and not historically.

In *Pendleton v Derbyshire County Council and the Governing Body of Glebe Junior School* the EAT held that a dismissal of a practising Anglican teacher for standing by her husband when he was sent to prison for child sex offences was indirect religious discrimination.

In *Tottenham Hotspur Ltd v HMRC* the First Tier Tribunal of the Tax Chamber has ruled on the status of payments made on the early termination of fixed term contracts for the former Spurs footballers Peter Crouch and Wilson Palacios on their transfer to Stoke City.

In *Achbita and another v G4S Secure Solutions NV* the Advocate General of the European Court considered whether a dress code applicable to all employees was direct and/or indirect discrimination under the EU Equal Treatment Framework Directive when it affected a Muslim worker who refused to remove her headscarf when requested by her employer and was dismissed.

In *Gomes v Higher Level Care Ltd* the EAT upheld the decision of an employment tribunal that a worker was not entitled to recover compensation for injury to feelings for her employer's failure to provide statutory rest breaks.

In *Carreras v United First Partnership Research* the EAT considered whether an employer's assumption that its employees would work around 12 hours a day was a "provision, criterion or practice" which put a disabled employee at a substantial disadvantage when compared with a non-disabled employee.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

May I also remind you of our forthcoming events:

Click any event title for further details.

Settlement Agreements: The Law and Best Practice
• Breakfast Seminar, 2nd August 2016

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

1. House of Commons Justice Committee publishes report into court and tribunal fees

The Justice Select Committee has published its ***report*** into the impact of fees in civil cases, including those in the employment tribunals. The Government's own post-implementation review of fees has not yet been published, although this was expected before the end of 2015.

The report states that the imposition of fees has "had a significant adverse impact on access to justice for meritorious claims". It recommends that the level of fees be substantially reduced and that the fee remission process be simplified.

It also criticises the splitting of claims into Type A and Type B as bearing little relation to the complexity or length of cases. Type A cases (including breach of contract, redundancy pay and unauthorised deductions from wages) have an issue fee of £160 and a hearing fee of £230. Type B cases (including unfair dismissal and discrimination claims) have an issue fee of £250 and a hearing fee of £950.

2: New illegal working offence

Regulations will bring into force a number of provisions in the Immigration Act 2016 concerning illegal working with effect from 12 July 2016.

A new role of Director of Labour Market Enforcement will be created to oversee the enforcement of anti-exploitation legislation by HMRC, the Gangmasters and Labour Abuse Authority (previously the Gangmasters Licensing Authority) and the Employment Standards Inspectorate.

The provisions create a new offence of illegal working. This will allow for an illegal worker's earnings to be seized under the Proceeds of Crime Act 2002.

Employers should be aware that the new provisions include an extension of the current offence of knowingly employing an illegal migrant. From 12 July 2016, employers who employ an illegal migrant and have reasonable cause to believe that the employee is disqualified from working because of their immigration status will commit the offence. The maximum sentence on conviction will increase from two to five years.

3: TUPE and service provision change: an organised grouping of employees

For a service provision change TUPE transfer, there must have been, prior to the change, an organised grouping of employees, the principal purpose of which was to carry out the relevant activities for the relevant client. In ***Amaryllis Ltd v McLeod*** the EAT considered that the principal purpose of any organised grouping of workers must be assessed at the point immediately before the change of provider, and not historically.

Millbrook Furnishings Ltd carried out work for the Ministry of Defence for many years renovating wood and metal furniture. Between 2003 and 2008 it did so as a sub-contractor to Amaryllis. From December 2012 the MoD awarded new contracts under a framework agreement. In 2014 the furnishings renovations contract was retendered among four contractors on the framework agreement. Millbrook was unsuccessful on the retender and instead the contract was awarded to Amaryllis.

The question was whether there was an organised grouping of employees in place prior to the transfer of work to Amaryllis, the principal purpose of which was to carry out the activities concerned on behalf of the MoD. It was accepted that Millbrook's employees were spending just shy of 70% of their time on the MoD renovations contract. Nonetheless the Employment Judge considered that it was appropriate to consider evidence relating to the past. The Employment Judge was satisfied that the department had originally been set up with the specific purpose of servicing the MoD contracts, and although that grouping now serviced other customers, the MoD was still the largest customer. He found TUPE applied.

Amaryllis appealed. The EAT upheld the appeal. It was not sufficient that a department carries out significant work for a client. It must be organised for the principal purpose of carrying out that work for the client. The relevant time is immediately before the transfer.

The Employment Judge was wrong to look at the matter on an historic basis. And it was incorrect to take into account work done on furniture renovation by Millbrook between 2003 and 2008 when Millbrook was a subcontractor of Amaryllis. During this time the MoD was not a client of Millbrook. Millbrook's client for this work was Amaryllis. That period could not be taken into account as, even if there were, during that period, an organised grouping of employees, the grouping concerned was not dedicated to carrying out the activities for the relevant client.

4: "Stand by your man": Dismissal of teacher was religious discrimination.

In ***Pendleton v Derbyshire County Council and the Governing Body of Glebe Junior School***, the EAT held that the dismissal of a practising Anglican teacher for standing by her husband when he was sent to prison for child sex offences was indirect religious discrimination. Mrs Pendleton was a junior school teacher. Her husband was the head teacher of another junior school in the same cluster. In July 2013, Mr Pendleton was convicted for offences which included covertly taking photographs of boys in his school while getting changed for PE. He was imprisoned for 10 months.

Mrs Pendleton had been warned by her school that it did not wish her to work at the school if she continued to support her husband following his conviction. Despite this, she decided to stay with her husband as he was "penitent" and she had taken a vow in the marriage ceremony to stay with him for better or worse.

Mrs Pendleton was suspended in the month following the conviction. The governing body of her school and the local authority pronounced that she was not considered suitable to be a teacher as she refused to leave her husband. Following a disciplinary procedure, Mrs Pendleton was summarily dismissed.

Mrs Pendleton brought a claim for indirect religious discrimination and unfair dismissal in an employment tribunal. The tribunal upheld her claim for unfair dismissal. It considered the employer had no fair reason to dismiss and described the employer's decision as "predetermined", "woefully inadequate" and outside the band of reasonable responses.

But it rejected the discrimination claim. It found that the school had a policy of dismissing people who refused to end a relationship in these circumstances which would be applied to all.

However, it found that this policy created no particular disadvantage for people with a strong belief in the sanctity of marriage vows. It held that people in long term loving relationships without that belief would be equally disadvantaged by the policy.

Considering the discrimination point on appeal, the EAT considered whether the decision to dismiss was based on a policy which could be a "provision, criterion or practice" (PCP) under the Equality Act 2010. It held that the school would have treated everyone in these circumstances in the same way. This was the case even though the action taken had no precedent.

The EAT also considered whether the group of people sharing Mrs Pendleton's beliefs would have been put at a particular disadvantage by the policy. While it commented that everyone in these circumstances would be disadvantaged to an extent by the policy, the EAT held that it would put those with a devout religious belief in the sanctity of marriage vows at a particular disadvantage.

The school had not presented evidence to the employment tribunal that the policy was objectively justified as a proportionate means of achieving a legitimate aim. The EAT therefore upheld the claim for religious discrimination. Employers should be aware that even actions taken in unique or very rare circumstances can be a PCP for the purpose of an indirect discrimination claim. There is no need for the action to be taken more than once. If the employer would act in the same way in these circumstances, the action could be taken to be a provision, criterion or practice. The school in this case was found to have had a closed mind and to have failed to consider alternatives to dismissal. It is advisable for employers to approach disciplinary procedures with an open mind and to include the consideration of less discriminatory sanctions as part of the process.

5: Taxation of termination payments

In ***Tottenham Hotspur Ltd v HMRC***, the First Tier Tribunal of the Tax Chamber has ruled that payments made on early termination of a fixed term contract were not taxable as earnings.

The case concerned payments made to two of Tottenham Hotspur's footballers (Peter Crouch and Wilson Palacios) when they agreed to the early termination of their contracts before their move to Stoke City.

The employment contracts included terms providing for the players' contracts to terminate early by mutual consent. Because of this, HMRC argued that the termination payments were earnings as they were "from" the employment of the players.

The Tribunal disagreed with HMRC. As the early termination provisions in the contracts were not engaged in the circumstances, it held that the payments were not from the employment, but were rather compensation for the player's surrender of rights under the employment contract.

The Tribunal made clear that a payment need not be damages for a breach of contract in order to qualify as a payment for the surrender of rights under the contract.

A key issue for the football club in this case was whether employer National Insurance contributions (NICs) were payable on the termination payments. As we mentioned in our March 2016 Employment Law Bulletin, the current rules on the payment of NICs by employers on termination payments are likely to change in the next few years. The Government announced in this year's Spring budget that, from April 2018, employers will be required to pay employer NICs on termination payments above £30,000 that are already subject to income tax.

6: Muslim headscarves at work: a view from the Advocate General

In ***Achbita and another v G4S Secure Solutions NV***, the Advocate General of the European Court considered whether a dress code applied to all employees was direct and/or indirect discrimination under the Equal Treatment Framework Directive.

Ms Achbita worked for G4S as a receptionist. The code of conduct for employees of G4S in Belgium included a prohibition on employees "wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them". Ms Achbita, a Muslim, refused to remove her headscarf and was dismissed.

Ms Achbita's religious discrimination claims were dismissed at first instance and on appeal in the Belgian courts. On a further appeal, the Belgian Supreme Court referred questions to the ECJ.

The Advocate General was of the opinion that the dress code was not directly discriminatory because it was a neutral requirement applied to all employees. She also stated that the dress code could be a genuine and determining occupational requirement under the Directive as the company had a legitimate business aim of religious and political neutrality and the dress code was a proportionate means of achieving that aim.

The Opinion also states that the dress code may constitute indirect discrimination as it puts female Muslim employees at a particular disadvantage. However, the code could be justified as a proportionate means of achieving a legitimate aim. The factors to be taken into account when deciding if the dress code is justifiable include the size and conspicuousness of the item of clothing or religious symbol in question and the nature and context of the employee's work (for example the fact that Ms Achbita came into regular contact with clients suggests the dress code is more likely to be justifiable in this case).

An Advocate General's opinion is not binding on the European Court itself, which is shortly to decide the case. But it is usually persuasive.

7: EAT confirms workers cannot be awarded compensation for injury to feelings relating to a breach of the Working Time Regulations.

In ***Gomes v Higher Level Care Ltd***, the EAT upheld a decision of an employment tribunal that a worker was not entitled to recover compensation for injury to feelings for her employer's failure to provide statutory rest breaks.

Miss Santos Gomes worked for Higher Level Care, a company providing accommodation and support for vulnerable young people. She brought a complaint in an employment tribunal that her employer was in breach of the Working Time Regulations because it had failed to ensure she had a rest break of 20 minutes when working for more than six hours a day.

The employment tribunal upheld her complaint and awarded her £1,220 in compensation. Compensation for a breach of the Working Time Regulations is based on the nature and extent of the employer's default and any economic loss suffered by the worker which is attributable to the matters complained of.

Miss Santos Gomes appealed to the EAT, arguing that she was also entitled to compensation for injury to feelings.

The EAT made clear that the basis of compensation for a breach of the Working Time Regulations is the default of the employer, rather than the effects of that default on the claimant. This is in contrast to claims relating to discrimination, whistle-blowing and trade union membership in which compensation is based on the injury suffered by the claimant and can include an injury to feelings award.

The EAT commented that it is arguable that an employment tribunal could award compensation for injury to health caused by the employer's default, but that injury to feelings is a different type of loss and is not recoverable. Employers should also be aware that workers could in some circumstances bring a claim in tort in the civil courts where a breach of the Working Time Regulations has caused injury to health.

8: Expectation that a disabled employee would work long hours was a PCP for the purposes of a reasonable adjustments claim

In ***Carreras v United First Partnership Research***, the EAT considered whether an employer's assumption that its employees would work around 12 hours a day was a "provision, criterion or practice" (PCP) which put a disabled employee at a substantial disadvantage when compared with a non-disabled employee.

Mr Carreras worked for a brokerage firm as an analyst. Before a serious cycling accident in 2012, he regularly worked 12 hours a day. Following his accident, he suffered dizziness, fatigue and headaches and was unable to concentrate when working late. His working time fell to around 11 hours a day. His employer made an express request that he work later and subsequently assumed that he would do so.

In February 2014, Mr Carreras objected to working late and was told that he could resign if he did not want to work the hours. On the same day he packed up his things, told human resources he was resigning and later confirmed his resignation in a short email. After being reminded of his post-termination obligations, Mr Carreras set out in detail his reasons for resigning four days later.

Mr Carreras brought claims for constructive unfair dismissal and disability discrimination, including a failure to make reasonable adjustments. An employment tribunal found he was disabled for the purposes of the Equality Act but dismissed his reasonable adjustments claim on the basis that the claimant had not shown there to be a requirement to work long hours.

The EAT allowed Mr Carreras' appeal. It found that the employment tribunal had taken too narrow a view in its interpretation of what might constitute a PCP of the employer. The EAT stated that the employment tribunal should have considered the reality of the situation more broadly rather than focusing on to what extent Mr Carreras was compelled to work late. The tribunal had found that the claimant was expected to work late and that this should have been enough to constitute a PCP which obliged the employer to make reasonable adjustments.

This case reminds us that a PCP can include unspoken rules and assumptions which in reality can create a disadvantage for an employee.

9 : Client briefing: hiring an employee

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

We consider in this briefing the key legal issues an employer needs to be aware of when recruiting a new employee.

Before advertising

- Make sure all staff involved in the recruitment process have had equal opportunities training and that such training is regularly updated
- Create the following documents:
    - a job description which sets out the title and main purpose of the job, the place of the job holder within the organisation and the main tasks or responsibilities of the post.
    - a person specification which details the experience, know-how and qualifications, skills and abilities necessary for the job in question. The requirements can be split between those that are "essential" for the job and those that are merely "desirable".

- Ensure that none of the requirements in either document discriminates against any particular group of potential or existing employees. In particular, consider whether any requirements for specific qualifications, working hours or times, travel, age ranges or dress are necessary for the job in question.
- Consider whether the job needs to be full-time or whether it is open to part-time, home working, flexible working or job sharing. If an employer specifies that the job is full-time, it may need to be able to justify its decision on the grounds of its legitimate business interests.

The advert

- Decide whether the job should be advertised internally, externally or both.
- Consider using specialist publications, websites and agencies to target different communities, ages and sexes.
- Think carefully when writing the advert. Protection from discrimination because of a protected characteristic (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation) covers all areas of employment, including job adverts. For example, avoid using language that might imply only someone of a certain age would be suitable (for example, “mature”, “experienced” or “young”).
- Ensure any employees absent from work (including women on maternity leave or those on long-term sick leave) are informed of the vacancy to enable them to apply. Failure to do so could amount to discrimination.

The application

- Use a standard application form to enable individual applicants’ answers to be directly compared against the selection criteria more easily and to help to avoid potential unlawful discrimination claims.
- Draw up a shortlist using the same criteria used in the job description and person specification. Every applicant should be marked against the same criteria to help avoid any potential unlawful discrimination claims.
- If an employer is making redundancies, it must consider applications for suitable vacancies from employees selected for redundancy ahead of external applicants. Women selected for redundancy while on maternity leave are entitled to be offered a suitable alternative vacancy (where one is available) in priority to other potentially redundant employees.

Pre-employment health questions

- A In most cases, an employer is prohibited from asking potential recruits questions about their health (for example, employers should avoid asking questions about an applicant’s sickness absence record).
- However, there are some circumstances where an employer is entitled to ask health-related questions. For example, asking an applicant for a job in a warehouse whether they have any health problems that may prevent them from lifting or handling heavy items. Employers can also check whether an applicant has any special requirements which it needs to take into account when making the arrangements for interview, such as wheelchair access.

The interview

- Think when and where the interview should take place. For example:
    - check whether the interview venue has access for disabled candidates;
    - holding an interview during a religious holiday could discriminate against applicants from that particular religion; or
    - candidates with children may require the interview to be conducted at a particular time.

- Ideally, all shortlisted candidates should be asked the same or similar questions to allow answers to be compared and to avoid the possibility of a discrimination claim
- Avoid asking questions about a candidate's personal life unless they are directly relevant to the requirements of the job (for example, it is unacceptable to ask a female candidate whether she plans to have children).
- Keep a paper trail throughout the process to demonstrate how the employer reached its decision to select the successful candidate. This should include:
    - selection criteria;
    - notes on the short listing process;
    - interview questions;
    - notes of panellists' assessments of the interviewees.
- It is good practice to provide feedback to unsuccessful candidates if it is requested. A failure to do so could indicate that a decision was based on discriminatory grounds.

The offer

- Make a written offer to the successful candidate. Consider whether to set a time limit for acceptance and specify that acceptance should be in writing.
- An employer can make the offer conditional on a range of criteria, provided they are not discriminatory. For example:
    - providing satisfactory references; or
    - confirmation that the employee is free to work in the UK or has an appropriate work permit or immigration approval to work.
- Before making a job offer, ensure the applicant confirms they are not bound by any restrictive covenants from their previous job; otherwise the new employer could be sued by the former employer. Restrictive covenants are used in employment contracts to protect an employer's business by restricting the activities of an employee, generally after employment has ended.

The contract

- Consider whether the contract should be permanent or for a fixed term. If an employer decides that a fixed-term contract is appropriate, it may need to justify why it reached that decision.
- Remember that an employee on a fixed-term or part-time contract should not be treated any less favourably than a permanent employee (for example, they should be allowed access to a company bonus scheme or instead receive an equivalent benefit).

Probationary periods

- A probationary period can be included in the contract. This will enable the employer to assess the employee and vice versa. It also gives it the flexibility to dismiss someone using a shorter notice period of at least one week.

Probationary periods typically last between three to six months and can be extended with the consent of the employee at the end of the term (for example, if the employee was sick and the employer was unable adequately to assess their performance, it may want to extend the period).

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