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# Employment Law BULLETIN

## Welcome to our May employment law bulletin.

The European Court has, in *USDAW v WW Realisation 1 Limited* decided that, for the purposes of compulsory information and consultation on collective redundancies, where the obligation arises where 20 or more employees are to be dismissed at any one establishment, the legislative wording means just that. An establishment can mean a smaller unit than the employer's entire operations. So, in the *Woolworths* case, where employees were dismissed by reason of redundancy and fewer than 20 employees were employed, they lost out on redundancy payments. The European Court held that this was correct.

In *Edwards v Encirc Limited* the EAT confirmed that attending meetings at the workplace in the capacity of a trade union or health and safety representative is working time for the purposes of the Working Time Regulations.

In *Cranwell v Cullen* the EAT has stoutly confirmed that an employment tribunal may not hear a claim for unfair dismissal if the ACAS early conciliation requirements have not been met.

In *British Airline Pilots' Association v Jet2.com* the High Court has held that individual pilots' rostering arrangements were not the subject of collective bargaining where the Central Arbitration Committee had, hitherto, confined the scope of collective bargaining to pay, hours and holiday.

In *Sharpe v The Bishop of Worcester* the Court of Appeal considered the employment status of a Church of England minister. He was neither a worker nor an employee.

**Finally may I also remind you of our forthcoming events:**

Click any event title for further details.

**Employment Law Update for Charities**

- Full Day Annual Conference, 11th June 2015

and in conjunction with ACAS:

**Understanding TUPE: A practical guide to business transfers and outsourcing**

- Full Day Conference, Leeds, 2nd June 2015

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## 1: The European Court has now clarified the meaning of ‘establishment’ for the purposes of collective redundancy consultation

As readers of our Bulletins will know, litigation over the insolvency of the Woolworths and Ethel Austin Stores in the UK, resulting in the dismissal on grounds of redundancy of thousands of employees across the United Kingdom, has been long running. The litigation is known as ***USDAW v WW Realisation 1 Ltd.***

Consultation under the EC Collective Redundancies Directive 98/59 is triggered when at least 20 dismissals are proposed at one ‘establishment’. The Court of Appeal asked the European Court of Justice for an opinion on whether the expression ‘at least 20’ in the Collective Redundancies Directive refers to the number of dismissals across all of the employers establishments in which dismissals are effected within a 90 day period or only the number of dismissals in each individual establishment. The Court of Appeal also asked the Court of Justice to clarify the meaning of ‘establishment’ and to explain whether it covers the whole of the relevant retail business, regarded as a single economic business unit, rather than the unit to which the workers concerned are assigned to carry out their duties, in other words, in each individual store.

The Advocate General (see our February Bulletin) gave an opinion to the effect that the social protection aims of the Directive did not support the broader interpretation of ‘establishment’. In his opinion, the word ‘establishment’ denoted “the unit to which the workers made redundant are assigned to carry out their duties, which it is for the national court to determine”.

The European Court of Justice now agrees.

It will be remembered that the Employment Appeal Tribunal held, in 2013, that a reading of section 188(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 in order to be compatible with the Collective Redundancies Directive required the deletion of the words ‘at one establishment’. The EAT also held that USDAW could rely on the direct effect of the Collective Redundancies Directive on the ground that the Secretary of State for Business was a party to the case and that it was responsible for the payment of the protective awards to all the employees in view of the employer’s insolvency.

The Secretary of State for Business Innovation and Skills appealed to the Court of Appeal and the Court of Appeal referred the matter to the European Court.

The European Court rejected the interpretation put forward by USDAW which relied upon the EAT’s decision.

There were a number of reasons. First, the term ‘establishment’, which is not defined in the Directive itself is a term of EU law and cannot be defined by reference to the laws of Member States. ‘Establishment’ must be interpreted in an autonomous and uniform manner in the EU legal order. Accordingly, where an undertaking comprises several entities, it is the entity to which the workers made redundancy are assigned to carry out their duties that constitutes the ‘establishment’.

The Court commented on the contention that dismissals in each establishment should be considered separately, noting that such an interpretation would significantly increase the number of workers eligible for protection under the Directive. That would indeed correspond to one of the Directives’ objectives. On the other hand, that interpretation would, said the Court, be contradictory to the Directive’s other objectives of insuring comparable protection for

worker's rights in the different Member States and of harmonising the costs which such protective rules entail for EU undertakings. Thus, this would:

> "…entail very different costs for the undertakings that have to satisfy the information and consultation obligations under articles 2 to 4 of the Directive in accordance with the choice of the Member State concerned, which would also go against the EU legislator's objective of rendering comparable the burden of those costs in all Member States".

The Court also pointed out that the EAT's interpretation would bring within the scope of the Directive not only a group of workers affected by collective redundancy but also, in circumstances just a single worker of an establishment - possibly of an establishment located in the town separate and distant from the other establishments of the same undertaking. That would, said the Court, by contrary to the ordinary meaning of the term 'collective redundancy'. Additionally, the dismissal of that single worker could trigger the information and consultation procedures referred to in the Directive. Those provisions were just not appropriate in such an individual case.

Member States are not prevented from adopting rules that are more favourable to workers, but when Member States do lay down such rules, they are nevertheless bound by the autonomous and uniform interpretation given to the term 'one establishment' in EU law. And the Court robustly stated that the interpretation of the words 'at least 20' requires a count to be taken of dismissals effected in each establishment considered separately.

The case will now return to the Court of Appeal. The European Court observed that the first employment tribunal took the view that the stores to which the employees affected by the collective dismissals were assigned to separate 'establishments'. It is for the Court of Appeal to establish whether the stores are to be classified as separate establishments using the guidance in the European Court's Judgment in USDAW and other ECJ case law authorities such as Rockfon (case C-449/93), Athinaiki Chartopoiia (case C-270/05) and Botzen (case C-186/83).e

## 2: Is attending meetings at the workplace in the capacity of a trade union or health and safety representative working time for the purposes of the Working Time Regulations?

Yes said the EAT in ***Edwards v Encirc Ltd.***

Mr Edwards and Mr Morgan were employed by Encirc on 12 hour shifts. Mr Edwards was also an employee health and safety representative and Mr Morgan was a trade union representative.

They attended, respectively, health and safety meetings and trade union meetings. These finished in the late afternoon leaving Mr Edwards only 6 hours break between his meeting and the start of his night shift and allowing Mr Morgan just 9 hours between the end of his meeting and the start of his night shift. The employees argued they should, for the purposes of regulation 10(1) of the Working Time Regulations 1998, be given 11 hours rest between the carrying out of their functions at the meetings and attending on shift. The employer disputed the meetings were "working time".

The EAT confirmed that regulation 2(1)(a) of the WTR requires that each of the three elements in the definition of working time must be satisfied. Thus, the worker must be (i) working (ii) at the employer's disposal and (iii) carrying out his activities or duties.

The employment tribunal found the claimants were "working" when at meetings. But it had adopted too narrow an approach to conditions (ii) and (iii).

The claimants were not, said the EAT, required to be under the employer's specific control and direction in terms of the carrying out of their duties or activities. A wider approach was allowed, which could include where an employer has required an employee to be in a specific place and to hold himself out as ready to work for the employer's benefit, which might include attending a trade union or health and safety meetings, allowing for a broad understanding of "benefit".

Also, there was no requirement that the activities or duties required were those for which the claimants were employed under their employment contracts. If they were engaged in activities that were (in the broader sense) for the benefit of the employer, arose from the employment relationship, and done with the employer's knowledge at and in an approved time and manner, that could be sufficient. Their claims were therefore remitted to the employment tribunal for re-consideration, applying this broader approach to "working time".

## 3: Can an employment tribunal hear a claim if the ACAS early conciliation requirements have not been met?

No, says the EAT in ***Cranwell v Cullen.***

In this case the facts were simple. The claimant put in a claim to an employment tribunal without previously complying with the requirement, in s.18A of the Employment Tribunals Act 1996, to supply prescribed information to ACAS. No statutory exemption from this requirement applied on the facts of the case. The Employment Judge rejected the claim on this ground. The EAT (Langstaff J) upheld that decision.

This was a sad case. If her allegations were true, the claimant appeared to have been "appallingly" badly treated, including being sexually harassed. She may have thought ACAS conciliation meant having to talk to the person meting out the alleged treatment. And she had an interdict (injunction) out against the employer.

But outside the permitted exemptions the Employment Judge had no choice. The requirement for ACAS Early Conciliation was absolute and strict. There was nothing in the Employment Tribunal Rules of Procedure that allowed discretion, even in a case which attracted the fullest sympathy of the Employment Judge and the President of the EAT.

## 4: Is there an obligation, in cases of compulsory trade union recognition, to negotiate on rostering, i.e. the shifts, hours and periods worked by the pilots, and other matters relating to pay, hours and holidays?

No, held the High Court in ***British Airline Pilots' Association v Jet2.com***

**The facts**

Under Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992) (TULRCA) a trade union may, in respect of a group of workers, apply to the CAC for statutory recognition and they become the bargaining unit. It applies to contractual terms and non-contractual ones such as management etc. are excluded from the statutory definition (paragraph 3(2) of Schedule A1 of TULRCA). On 18 November 2014 it was decided by the Central Arbitration Committee (CAC) that the Claimant is recognised by the Defendant as entitled to conduct collective bargaining on behalf of the bargaining unit in relation to pay, hours and holidays.

The airline and the union could not agree about the method of collective bargaining so the CAC prescribed a method to be used (the Specified Method), largely based on the model method set out in the Trade Union Recognition (Method of Collective Bargaining) Order 2000 (SI 2000/1300). The Specified Method provided that a Joint Negotiating Body be established to conduct the collective bargaining on an annual basis and prescribed a seven-step procedure to be followed in each round of bargaining. It prohibits Jet2 from varying "the contractual terms affecting the pay, hours or holidays of workers in the bargaining unit," unless it has first discussed its proposals with the union.

The question was whether the method adopted was followed and in particular, the court considered whether it extended to pilots' rostering arrangements.

The rostering arrangements were contained within the 'Operations Manual' and its 'Rostering and Crewing Policy' (the Policy), which set out a system for allocating flying hours and time off, and ensuring an even distribution of work, adequate rest periods and fully crewed flights. The Policy is non-contractual.

The High Court held that the airline was not obligated to negotiate with a recognised trade union over pilots' rostering arrangements whereby the specified method of collective bargaining had already been imposed by the CAC.

They held there was no obligation where it was:

1. Not 'apt for incorporation' because they were non-contractual in nature (expressing an objective or aspiration);

2. Not suited for negotiation within the statutory framework; and/or

3. Not within the core, contractual, terms relating to pay, hours and holidays

The obligation on the airline is to discuss pay with the union before any changes are made to pilots' pay which the airline had followed. Even though they pre-announced its proposed pay rises in advance of annual pay negotiation this was allowed. In addition, the non-contractual elements contained in the rostering arrangements were outside the scope of the statutory collective bargaining. To include all the terms as contractual would negate the flexibility required in such arrangements, such as swapping shifts at the last minute, which the court decided would not make 'business sense' in the context.

### Conclusion

The scope of collective bargaining, for the purposes of compulsory recognition, under current legislation has been reduced to only include negotiations about pay, hours and holidays. These changes were made to encourage voluntary agreements and promote compromise between unions and employers over the terms of such voluntary agreements rather than imposing compulsory, statutory, arrangements and agreements.

## 5: A Church of England minister was not an employee or a worker

In ***Sharpe v The Bishop of Worcester***, the Court of Appeal considered the employment status of a Church of England minister, who had been found to be neither an employee nor a worker by an employment tribunal (under sections 230 and 43K of the Employment Rights Act 1996-ERA).

The Court of Appeal agreed with the employment tribunal and upheld their decision, overturning the EAT's decision, which meant that the minister was unable to bringing claims for unfair dismissal and whistleblowing. Only employees can bring unfair dismissal claims and you need to be either an employee or a worker to be protected by the whistleblowing legalisation.

It held this because there was no contract and it was not necessary to imply one as the relationship between the minister and the Bishop was governed by ecclesiastical law. Even if this were not the case, they would not be able to imply an employment contract as the relationship did not lend itself to an employment one. For example, there was a lack of supervision and control and no right of summary dismissal or indeed any other way for the Bishop to discipline the minister.

The court concluded that the minister was not a worker either as the statutory definition does not extend to non-contractual situations (section 43K of the ERA). The ERA provides protection for whistle-blowers on two levels one applicable to employees and the other to workers but again the minster did not fall into either category so Mr Sharpe could not benefit from this protection.

Clergy on common tenure are office holders rather than employees, but have particular legal rights set out in the Ecclesiastical Offices (Terms of Service) Regulations 2009, enforceable in the employment tribunals. This came into force on 31 January 201. These include:

- rights to a written statement of particulars;
- an uninterrupted rest period of 24 hours every seven days
- family-related leave;
- access to capability and grievance procedures; and
- a right not to be unfairly dismissed on capability grounds

The question was whether there is a legally binding contract which depends on whether the parties intended the benefits and burdens of the ministry to be the subject of a legally binding agreement between them.

### Facts

The Reverend Mr Sharpe was an ordained minister in the Church of England. He made claims for whistleblowing, as a result of making protected disclosures which he claimed caused him to suffer and unfair dismissal. Day- to-day he was able to administer pastoral care as he saw fit. The bishop had little control over the day-to-day activities and how the minister complied with his duties. He could not impose any disciplinary action nor remove the minister from office.

Key points of what the employment tribunal found originally were, as follows:

- There was no written contract and one could not be implied as the offer to be appointed was not established in law but by ceremony
- In addition, there was no contract to be implied as there an employment relationship could not be established including undertaking the work personally or identifying the contractual parties

- Papers covering his role and responsibilities could not be deemed as contractual terms as they lacked precision and were mainly spiritually based so could not be incorporated
- Furthermore, it was not necessary to imply a contract, because the relationship between Mr Sharpe and the Bishop was defined and governed by ecclesiastical law.
- There was no legal relationship
- There was a contractual relationship with the Bishop, who had no control over or obligation to pay and only had limited powers to instruct, supervise or discipline Mr Sharpe so a lack of supervision or control
- Finally, it was recognised practice in the Church of England that rectors were not employees
- Mr Sharpe could not be a worker under section 43K ERA 1996, because to qualify under section 43K(1)(a), a worker must have a contract with at least one of either the supplier/introducer of the end user of his services, and Mr Sharpe had neither.

It held that Mr Sharpe was neither an employee nor a worker. Mr Sharpe subsequently appealed the decision.

The key aspects of the EAT's decision to allow the appeal were, as follows:

- The employment tribunal placed too much emphasis on ecclesiastical law
- They did not examine the papers containing the duties and responsibilities sufficiently
- The reliance on expert evidence by Professor McLean, an expert in the field of ecclesiastical law.

The EAT concluded that what was needed was a full analysis of all the relevant documents, circumstances and the church itself to determine if a contractual relationship could be established. It referred the matter to a fresh tribunal to be decided in accordance with the principles set out in its judgment.

The Court of Appeal allowed the appeal and reinstated the order of the employment tribunal, on the following basis:

1. There was no contract - express or implied - and the employment judge has examined the issues correctly, based on the facts and case-law.

2. It applied the Ready Mixed Concrete (Ready-Mixed Concrete (South East) Limited v the Minister of Pensions and National Insurance [1968] 2 QB 497) tests as to whether if there had been a contract whether it would have been considered an employment one, as follows:

    2.1 An agreement existed to provide the servant's own work or skill in the performance of service for the master in return for a wage or remuneration.

    2.2 There was control of the servant by the master.

    2.3 The other provisions were consistent with a contract of employment.

3. Other factors included: no negotiation between them about the terms of service the Bishop had little power over his appointment, no obligation to pay, the Bishop had not power to terminate the employment and negligible disciplinary powers.

4. It was important to analyse the legal arrangements and what they objectively convey

The Court's finding that there was no contract at all meant that Mr Sharpe was not a worker either.

## 6: European Commission consults Social Partners about consolidation of the EU Directives on Information and Consultation of Workers

The European Commission has initiated a first phase consultation of Social Partners under article 154 TFEU on a consolidation of the EU Directives on Information and Consultation of Workers (Brussels, 10.4.2015, C (2005) 2303 final).

A 'fitness check' on EU law in the area of information and consultation of workers was published in a Commission staff working document in 2013 (SWD (2013) 293 final of 26.7.2013). This was to see whether the Directives on information and consultation of workers at national level (Directives 98/59/EC on collective redundancy, 2001/23/EC on transfers of undertakings and 2002/14/EC on a general framework relating to information and consultation of workers) would broadly 'fit for purpose' i.e. generally relevant, effective, coherent and efficient. The 'fitness check' bought up several questions of effectiveness and coherence. As a result the Commission has announced that it has launched a consultation of the three Directives on information and consultation as part of the REFIT initiative to simplify, reduce regulatory costs and consolidate legislation (REFIT means the Regulatory Fitness and Performance Programme. See Commission Communication: "EU Regulatory Fitness": Strasbourg, 12.12.2012 COM (2012) 746 final; Commission Communication: "REFIT: Results and Next Steps": Brussels, 2.10.2013 COM (2013) 685 final; Commission Communication: "REFIT: State of Play and Outlook": Brussels, 18.6.2014 COM (2014) 368 final).

The detail may be found in the consultation document in which the need for consistency amongst all Directives in the area information and consultation is discussed, with the examination of the option of a recast.

There are two particular points of interest as far as the UK is concerned. The first (see para 3.2) is with regard to the scope of the application of the Directives relating to the extent to which the public sector is covered or not. The information and consultation Directives apply to public undertakings carrying out an economic activity, whether or not operated for gain but do not cover public administration. For example in USA v Nolan (case C-583/10; [2012] IRLR 1020) the European Court of Justice emphasised that Directive 98/59/EC on collective redundancy consultation does not cover activities of the public administration which fall within the exercise of public powers. In contrast, the provisions of the implementing legislation in the UK, chapter 2, part V of the Trade Union and Labour Relations (Consolidation) Act 1992 can be construed as applying to workers employed by a public administrative body (see United States of America v Nolan [2014] EWCA Civ 71). But TUPE expressly excludes from its scope "an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities" (TUPE, reg 3(5) (thus mirroring the Acquired Rights Directive 2001/23)). But the consultation document points out that the employment relationship of public sector workers is changing and becoming more and more like a private sector contract. Accordingly one of the matters required to be reviewed is whether public administration should be included in the personal scope of the application for the Directives. Whilst this would not affect UK law in respect of collective redundancies, this would impact on the scope of the TUPE Regulations.

Secondly, the consultation document suggests that Directive 98/59/EC on collective redundancies and 2001/23/EC the transfer of undertakings do not provide for specific definitions of the concepts of "information" and "consultation" whereas Directive 2002/14 (on a general framework for informing and consulting employees) does. The fitness check considered that differences in definitions are mainly due to the will of the legislator and differences in legal drafting technique

which do not necessarily imply less protection of workers in practice. But the consultation document asked the question whether the alignment of the three Directives would improve standards in terms of definitions.

## 7: Client briefing: Time off for dependants

This client briefing provides just 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.

This client briefing sets out how an organisation should respond when one of their employees requests time off work to deal with a situation affecting a dependent.

**When can an employee request time off?**

- Employees are entitled to take a reasonable amount of unpaid time off work when it is necessary to deal with certain unexpected or sudden events affecting a dependent. This right is available to all employees, irrespective of::
  - Their length of service;
  - Whether they work full time or part time; or
  - Whether they are employed on a permanent, temporary or fixed term basis.
- Employees have the right to take a reasonable amount of time off in the following situations:
  - To provide assistance if a dependent falls ill, gives birth, is injured or assaulted. An illness or injury does not have to be serious or life threatening to be covered
  - To make care arrangements for the provision of care for a dependent who is ill or injured (for example, taking a sick child to stay with relatives);
  - If a dependent dies. In these circumstances, unpaid time off is intended to enable an employee to deal with practical matters required as a result of the death (for example, arranging and attending a funeral). This should not be confused with compassionate leave, which the business may deal with separately;
  - To deal with the unexpected disruption, termination or breakdown of arrangements for care of a dependent (for example to make alternative arrangements if a child's nanny is ill); or
  - To deal with an unexpected incident involving a child during school hours.
  - Organisations can also decide to allow employees unpaid time off in situations other than those listed above (for example, if their central heating system breaks down).

**Who is a dependent?**

- A spouse, civil partner, child or parent (but not grandparent) of the employee
- A person who lives in the same household as the employee (excluding tenants, lodgers and borders).
- Anyone who reasonably relies on the employee:
  - To make arrangements for care to be provided if their existing arrangements are unexpectedly disrupted or terminated;
  - Because they have fallen ill, given birth, been injured or assaulted; or
  - To make arrangements for care to be provided because they are ill or injured.

### What is a 'reasonable' amount of time off?

- This will always depend on the nature of the incident and the employee's individual circumstances. However in the vast majority of cases it is unlikely that an employee should reasonable require more than a few hours or, at most, one or possibly two days to deal with that incident affecting dependent.
- Unpaid time off for dependents is intended to be a short term solution to deal with an immediate crisis. The organisation should discuss alternative arrangements with the employee (for example, taking annual leave or temporary flexible working arrangements), if the situation affecting their dependent is likely to require more time to resolve.

### What obligations do employees have?

- Unless it is impossible for them to do so until they return to work, employees will only be entitled to take time off to care for a dependent if they inform the organisation:
  - As soon as possible of the reason for their absence; and
  - How long they expect to be away from work.

### Penalties

- If an employment tribunal finds that an employee has been refused permission to take time off, or was subjected to a detriment for taking it (or seeking to take it), the tribunal can award compensation to the employee.
- If a tribunal decides that the employee has been unfairly dismissed for taking time off to look after a dependent, it can order the business to:
  - Reemploy the dismissed employee on new terms with no loss of continuity of employment (reengagement);
  - Reemploy the dismissed employee on the same terms of employment with no loss of continuity of employment (reinstatement); or.
  - Interview questions;
  - To pay compensation.

### Practical steps for organisations to take

- Implement a clearly worded policy setting out the circumstances in which employees can take time off to care for their dependents and any evidence the organisation may require.
- Set out the notification procedures that employees must follow in the policy.
- Stipulate the penalties for abusing the right and for failing to follow the notification procedures in the policy.
- Explicitly state in your disciplinary procedure that abuse or breach of the policy will result in disciplinary proceedings being instigated..
- Publicise the policy so that employees cannot claim they were unaware of their obligations.
- Signpost other rights that employees may have which may be more appropriate (for example, parental leave).

**If you'd like to contact us please email** john.mcmullen@wrigleys.co.uk

Wrigleys Solicitors LLP, 19 Cookridge Street, Leeds LS2 3AG. Telephone 0113 244 6100 Fax 0113 244 6101 If you have any questions as to how your data was obtained and how it is processed please contact us. Disclaimer: This bulletin is a summary of selected recent developments. Legal advice should be sought if a particular course of action is envisaged.