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EMPLOYMENT LAW BULLETIN

NOVEMBER 2017

Welcome to our November employment law bulletin.

This month we have interesting cases from an employment tribunal, the EAT and the European Court of Justice.

In *Uber BV and others v Aslam and others* the EAT has upheld the decision of an employment tribunal that Uber taxi drivers are workers and entitled to the National Minimum Wage and paid holiday. This decision was largely expected and follows a line of recent cases where worker status was established despite the fact that the relationship concerned was clearly labelled in a written contract as that of a contractor/customer.

In *Ramos v Servicio Galego de Saud* the European Court has held that an employer must carry out a specific assessment of work place risks to a breastfeeding worker if their role exposes them to certain industrial hazards.

In *Parker v Medical Defence Union Services Ltd and another*, the EAT has upheld the decision of an employment tribunal that non-uniform accrual rules of a pension scheme did not unlawfully disadvantage a part-time pension scheme member.

In *Gould v Trustees of St John's Downshire Hill* the EAT has overturned an employment tribunal's preliminary decision and allowed a religious minister's discrimination claim to proceed. He had marital difficulties which brought about his dismissal. He claimed this was direct discrimination on the grounds of his marriage. An employment tribunal struck out the claim as having no reasonable prospect of success. But the EAT has disagreed. The case will raise interesting points of law when it proceeds.

In *Page v NHS Trust Development Authority* an employment tribunal has considered whether the removal of a director after he gave media interviews expressing his opposition to adoption by same-sex couples was discriminatory on the grounds of religion or belief. His claim was dismissed on the facts of the case.

In *Jet2.com Ltd v Denby* the EAT has upheld an employment tribunal ruling that Jet2 had unlawfully discriminated against a prospective pilot as a consequence of his past activities as a member of a trade union.

In *Porras Guisado v Bankia SA and others* Advocate General Sharpston has given her opinion on the interplay between the European Collective Redundancies Directive and the Pregnant Workers Directive. The Advocate General expressed the view that a collective redundancy exercise will not necessarily be an "exceptional circumstance" under the Pregnant Workers Directive allowing an employer to dismiss a pregnant worker.

Finally, may I remind you of our forthcoming events:

- **What's New in Employment Law?**
  Breakfast Seminar, Leeds, 5th December 2017
  For more information or to book

And in conjunction with ACAS

- **Understanding TUPE: A Practical Guide to Business Transfers and Outsourcing**
  A full day conference, Leeds, 12th December 2017
  For more information or to book

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EAT agrees that Uber drivers are workers

In *Uber BV and others v Aslam and others*, the EAT upheld the decision of an employment tribunal that Uber taxi drivers are workers and entitled to the National Minimum Wage and paid holiday.

Readers should consider our November 2016 bulletin for a full discussion of the employment tribunal decision. In summary, Uber argues that it is simply a technology company offering an on-line platform to connect self-employed drivers to those who wish to hail a cab. Complex contractual documentation sets out this purported arrangement between Uber BV and individual drivers. Uber contended in the employment tribunal that a contract is made between the driver and the passenger for every trip and that it is merely an agent for the drivers. Uber London Ltd holds the Private Hire Vehicle (PHV) licence and there is no written contract between this company and the drivers.

But the employment tribunal was scathing about the written documentation, describing the idea that Uber drivers were running their own small businesses as "faintly ridiculous". It decided that the time during which the drivers were in their authorised territory, signed into the Uber app and ready and willing to accept work was "working time" and should be counted when calculating whether the drivers are being paid the National Minimum Wage.

The EAT agreed. It held that the employment tribunal was entitled to find that there was no contract between the drivers and the passengers on the basis that the drivers were never given passenger details and could not establish business relationships with their passengers or negotiate terms with them. It held that the tribunal was not bound to assume that the written documents accurately reflected the relationship between the parties and that the correct approach was to examine the reality of the situation, focusing on the extent to which the drivers are controlled by Uber and integrated into its organisation. The EAT was not persuaded by Uber's argument that the tribunal should not have taken the PHV licence requirements into account and commented that Uber had gone beyond these by interviewing and inducting drivers, not sharing passenger details with drivers and operating a complaints procedure without referring to the drivers.

The EAT considered whether the drivers might only be working when they were actually carrying passengers. It noted that it was theoretically possible for drivers to accept non-Uber bookings during the period they were signed into the app. However, the EAT agreed with the tribunal that the drivers' waiting time was working time, given that drivers are given warnings by Uber for not accepting a booking and that a driver could ultimately be suspended or blocked from the app for this.

This decision was expected and follows a line of recent cases where worker status has been established, despite the fact that the relationship was, in these cases, clearly labelled in the written contract as a contractor-customer relationship. Uber is reported to have lodged an appeal direct to the Supreme Court ("leapfrogging" the Court of Appeal).

Failure to assess the risks for an individual breastfeeding worker may be direct sex discrimination

In *Ramos v Servicio Galego de Saude*, the European Court has held that an employer must carry out a specific assessment of the workplace risks to a breastfeeding worker if their role exposes them to certain potential hazards including exposure to shocks, vibration, movement, noise, ionising radiation, extremes of hot or cold, biological or chemical agents. A general assessment of the role will not be sufficient; the circumstances of the particular worker must be considered in the assessment. The Court also stated that a failure to complete such an assessment could constitute direct sex discrimination under European law. This contradicts the UK Equality Act exception which expressly states that a woman who has been less favourably treated at work

because she is breastfeeding cannot claim direct sex discrimination. Rather, she must bring an indirect discrimination claim, or rely on her rights under the Management of Health and Safety at Work Regulations.

Ms Ramos is an accident and emergency nurse in Spain. She notified her employer that she was breastfeeding and asked for her working conditions to be adjusted, as she believed her shift pattern and exposure to ionising radiation, infections and stress negatively impacted on her lactation. He employer refused to adjust her working conditions, pointing to a report which stated that her role did not pose a danger to her baby.

Ms Ramos applied for financial assistance available in Spain to breastfeeding mothers but was turned down on the basis that her employer stated her role was risk free and that she had been declared fit for her role by a doctor. With the support of her line manager and a hospital consultant, she challenged this decision in the Spanish Social Court. Her challenge was dismissed. On appeal to the Galician High Court of Justice, questions were referred to the European Court.

The Court made reference to European Commission guidelines on the assessment of risks to pregnant and breastfeeding mothers at work issued in November 2000. It noted that the guidelines require that an employer assesses the risks to a particular worker once she has notified the employer that she is breastfeeding. In Ms Ramos' case, the hospital had relied on a generic assessment of the role of an A&E nurse, rather than considering the particular risks posed to her at the time she was breastfeeding. It also held that such an omission could constitute direct sex discrimination.

Employers should be aware of their duty to carry out a specific examination of the risks posed to a worker who has told them she is breastfeeding. This case makes clear that it will not be enough to refer to pre-existing risk assessments based on the role undertaken by the worker. If risks are identified, the employer must take steps to prevent them. If this is not possible, the breastfeeding worker should be moved to a different role or, where this is not feasible, allowed to take paid leave for the period of risk. It is interesting to note the Court's ruling, which runs counter to the Equality Act. It remains to be seen whether a UK worker will try to bring a direct sex discrimination claim on this basis, and whether the UK Courts will rule on the compatibility of UK law with European law.

Pension scheme accrual rules did not discriminate against part-timer

In *Parker v Medical Defence Union Services Ltd and another*, the EAT upheld the decision of an employment tribunal that non-uniform accrual rules of a pension scheme did not disadvantage a part-time pension scheme member.

Ms Parker was a member of the Medical Defence Union pension scheme for 27 years. For most of that time she worked part time. The scheme provided that a member who worked full time and had at least 20 years' service would receive two thirds of their final salary. Members who worked part time would receive an equivalent proportion of their final salary. A member who had worked four days a week would therefore receive 80% of 2/3 final salary. An unusual feature of the scheme rules was the fact that the actual accrual rate depended on the age at which the member joined the scheme. This meant that someone who joined the scheme aged 40 and who worked for 20 years would end up with the same pension as someone who joined the scheme aged 35 and worked for 25 years. Both would receive two thirds of final salary.

Ms Parker had accrued 21 years' full time equivalent service and so argued that she had been treated less favourably than a member who worked full time and had accrued 21 years' service. She contended that such a member would receive a higher pension than her (as no part-time percentage reduction would be applied).

An employment tribunal and the EAT dismissed Ms Parker's arguments on the basis that the correct comparator was not simply a man of the same age retiring on the same date with 21 years' full time service. Because of the oddities of the scheme rules, the correct comparator in this case was a man of the same age, retiring on the same date with 21 years' full time service *who started on the same date as the claimant*. The EAT noted that this comparator would actually receive a lower pension than the claimant.

This case featured a rare pension scheme rule which has now been replaced. However, it is interesting to note the EAT's approach in this case. Although scheme rules may create apparently unfair results, it is not for the tribunal to intervene to make a scheme fairer. It can only decide whether the scheme rules, or the way they have been applied, involves unlawful discrimination.

Church of England Minister dismissed for marital difficulties may have been discriminated against on the ground of marriage

In *Gould v Trustees of St John's Downshire Hill*, the EAT has overturned an employment tribunal's preliminary decision and allowed a minister's discrimination claim to proceed. The facts of the case are interesting.

The Reverend Gould had worked as a minister at St John's since 1995. In 2015, he and his wife went through difficulties in their marriage and a separation became likely. The trustees of the church expressed their concern that these marriage difficulties and a potential separation were incompatible with the teachings of the church and put pressure on Rev Gould to take a sabbatical in order to focus on saving his marriage. He unwillingly commenced a sabbatical in March 2016. In August 2016, Rev Gould was dismissed. The trustees cited a breakdown in trust and confidence as the reason for the dismissal.

Rev Gould brought a claim in an employment tribunal for direct discrimination on the ground of his marriage. At a preliminary hearing, the employment tribunal struck out the claim as having no reasonable prospects of success. The employment judge decided that the reason for the dismissal was Rev Gould's marriage difficulties and not his marriage itself.

The EAT disagreed. Mrs Justice Simler noted that, in discrimination law, there is no need for the protected characteristic to be the only reason or the main reason for the less favourable treatment. She stated: "If the fact that a claimant is married plays an operative part in the reason or reasons the employer has for treating that person less favourably, that is sufficient to engage the protection." She held that it was the claimant's case that "the difficulties in his marriage were…only significant to the Respondent because there was a marriage in which there could be difficulties" and noted that the importance placed on marriage by the Respondent led to Rev Gould's marriage difficulties being problematic for the Respondent. She identified that the claimant's case was that discrimination "flowed from the composite reason of his being married and having marital difficulties".

Mrs Justice Simler held that the correct comparator in this case was someone in the same circumstances as the claimant who was not married. That is, a minister of the same church who was having relationship difficulties with a long term partner to whom he was not married. She dismissed the Respondent's argument that allowing the appeal would mean a minister who committed adultery would be protected from dismissal under the Equality Act. Mrs Justice Simler commented that the comparator in that case would be a minister who was sexually unfaithful to his common law partner. If a married person in that circumstance would have been treated less favourably than an unmarried person, the legislation would apply to protect the married person.

Ministers of the Church of England are not usually employees of the Church. However, the Equality Act 2010 applies to a wider group of employees, workers and self-employed people who are required to provide a personal service and this includes non-employed ministers. This is a fascinating case which is a reminder that discrimination may occur even though the protected characteristic is not the only or main reason for the treatment. What Mrs Justice Simler terms "composite" reasons for less favourable treatment which entail a protected characteristic may also constitute discrimination.

Employment tribunal finds removal of NHS Trust director was not religious discrimination

In *Page v NHS Trust Development Authority*, an employment tribunal considered whether the removal of a director after he gave media interviews expressing his opposition to adoption by same-sex couples was discriminatory on the ground of religion or belief.

Mr Page, a non-executive director of the Trust who is a practising Christian, spoke repeatedly to the media about his views that same-sex couples should not be able to adopt. The Trust had made a number of requests that he should not give media interviews without first informing the Trust. He did not inform the Trust before speaking to the media. Mr Page was removed from his position.

Mr Page brought a discrimination claim to an employment tribunal. The tribunal found that there was no direct discrimination as he had been removed because he had failed to inform the Trust that he would be speaking to the media and because he did not distinguish between his personal views and his high-profile public position. Mr Page's indirect discrimination and human rights claims were also dismissed.

It has been reported that Mr Page is likely to appeal this decision.

EAT upholds broad interpretation of "trade union membership"

In *Jet2.com Ltd v Denby*, the EAT has upheld an employment tribunal ruling that Jet2.com Limited had unlawfully discriminated against a prospective pilot as a result of his past activities as a member of a trade union.

Mr Denby had been a pilot for Jet2 in the past and, whilst working for the company, had actively campaigned for the British Airline Pilot's Association (BALPA) to represent pilots of the airline. Jet2's Executive Chairman did not want to recognise BALPA and was hostile to Mr Denby's suggestion. The matter went to arbitration, where the Central Arbitration Committee ordered Jet2 to recognise BALPA, and then resulted in further litigation on the grounds that Jet2 had failed to comply with the CAC's ruling.

Mr Denby subsequently left Jet2 to work for another airline, but in 2014 he applied to return to Jet2. Mr Denby passed all stages of the selection process, however the Flight Operations Director blocked Mr Denby's application.

In 2015, Mr Denby applied again to Jet2. Mr Denby had, by this time, ceased to be a member of BALPA. Jet2 did not respond to Mr Denby's application. However Jet2's Executive Chairman emailed the Flight Operations Director to say that Mr Denby "told me that he was a shop steward at his previous company before us as well - so I don't know why this leopard will change his spots". Following confirmation that his application had been unsuccessful, Mr Denby brought an employment tribunal claim arguing that he had been unlawfully refused employment because he was a member of a trade union.

An employment tribunal found in Mr Denby's favour, concluding that 'membership' of a trade union should be interpreted broadly and included advocating on behalf of a trade union (as Mr Denby had done when previously employed by Jet2). Jet2 argued unsuccessfully that there were other reasons for the rejection of his application.

Jet2 appealed on several grounds, one of which was that the trade union protections did not include *past* membership activities. The EAT rejected these arguments, confirming that membership of a trade union was a broad term which included past membership activity, consequently upholding the employment tribunal ruling that Mr Denby had been treated unlawfully by Jet2.

This case acts as a reminder to employers that trade union "activities" and "membership" will be interpreted broadly by employment tribunals. Employers should beware of making any decision on the basis any trade union activities or membership, whether recent, or some time in the past.

Pregnant workers may qualify for protection before notifying their employer of the pregnancy

In *Porras Guisado v Bankia SA and others*, Advocate General Sharpston has given her opinion on the interaction between the European Collective Redundancies Directive and the Pregnant Workers Directive.

Ms Porras Guisado was dismissed by her employer, a Spanish bank, as part of a collective redundancy exercise. After being scored under agreed selection criteria, she was selected for redundancy. The claimant was pregnant at the time of the dismissal but the bank stated that it was unaware of this at that time. The claimant challenged her dismissal in the Social Court but was unsuccessful.

She appealed to the High Court of Catalonia which referred questions to the European Court. One of these questions was to clarify whether a collective redundancy exercise could be an "exceptional circumstance" under the PWD, allowing an employer to dismiss a pregnant worker. The Advocate General has expressed her opinion that a collective redundancy exercise will not always be exceptional, as such an exercise is a fairly regular event. There would need to be other exceptional circumstances for the exemption under the PWD to apply.

The opinion confirms standard practice under UK law that a pregnant worker cannot be dismissed simply because she is part of a collective redundancy exercise. Such a dismissal would only be lawful where there is no plausible possibility of reassigning the pregnant worker to a suitable position.

The Advocate General also expressed her opinion that there is a contradiction in the PWD as the protected period extends from the beginning of pregnancy to the end of additional maternity leave, or earlier if the woman returns to work before that. However the definition of a "pregnant worker" in the PWD is a pregnant worker who has notified her employer of the pregnancy. She acknowledged the lack of clarity in the PWD and urged the Court to address this issue in its judgment. She commented that an employer who does not know about the pregnancy cannot comply with the PWD. However, she stated that, once notified, an employer could remedy the situation by reinstating a pregnant worker or deselecting her for redundancy. It will be interesting to note that the Court's final decision on this.

Under UK law, employers cannot discriminate against an employee on the grounds of pregnancy or maternity (from the beginning of the pregnancy to the end of maternity leave). Where a redundancy situation arises during maternity leave, and the woman would otherwise be made redundant, she must be offered a suitable alternative vacancy where one is available. This protection does not begin until maternity leave is under way. It is, however, automatically unfair to dismiss a woman at any time or to select her for redundancy when the reason for the dismissal or selection for redundancy is connected to her pregnancy or statutory maternity leave.

TUPE and transnational transfers

It is common ground that TUPE can apply even if the business or service being transferred is leaving the UK to go to another country, even if that country is outside the EU. That was established by the EAT in *Holis Metal Industries Ltd v GMB* [2008] IRLR 187. Often, there is no employment rights issue involved, as employees may simply not wish to transfer their place of work to another country. The focus is then usually on redundancies (although when there is a transnational transfer, the transferor employer must remember to inform and consult with employee representatives, as the employer failed to do in *Holis* itself). The issue arose again in *Xerox Business Services Philippines Inc. Ltd (UK Ltd) v Zeb*.

In this case, Mr Zeb was employed as a commercial executive in a finance accounting team by Xerox UK Ltd (X UK) in Wakefield. His contract provided for his work location to be "Leeds or Wakefield" although at the material time, he was employed at a business park at Wakefield near junction 41 of the M1. It was decided to move some of the accounting team's work offshore. It chose to move the finance accounting team function from X UK in Wakefield to Xerox Business Services Philippines Inc. Ltd (X Philippines) in Manilla in the Philippines.

The employer accepted that TUPE applied. It told employees that they had a choice. They could formally object to the transfer. If so, their employment would not transfer to X Philippines but they would be made redundant on more generous terms than the law required. If they did not signify objection, they could transfer for X Philippines but only on local Philippines terms and conditions and they would be paid a statutory minimum redundancy payment from X UK as it would have no requirement to carry out the transferring work in the UK after the transfer.

In this case, Mr Zeb wanted to go with the transfer and he wanted, under TUPE, to go under his present terms and conditions. His present terms and conditions were 10 times more favourable than local conditions in the Philippines. The employer would not agree to a transfer to the Philippines on UK terms and conditions. He was dismissed and given a statutory redundancy payment, a payment in lieu of notice and other payments due. He claimed unfair dismissal. He believed he was entitled to transfer to Manilla on the same terms and conditions that he enjoyed in the UK and his dismissal was automatically unfair under TUPE. The Employment Judge found that there had been a variation of Mr Zeb's contract involving a change of workplace from Wakefield to Manilla. As such, he was entitled to go, under TUPE, under UK terms and conditions and as he was prevented from doing so, he was automatically unfairly dismissed. Redundancy was not the true reason for dismissal as contended for by the employer, as there was a TUPE transfer. The employer appealed.

It was accepted by the parties that there was a TUPE transfer and that *Holis* applied. Although *Holis* was not in any way disapproved by the EAT in *Xerox* there was no need to discuss the merits of the *Holis* decision, given the concession by the parties in the case. The question was whether the Employment Judge had been right. The case raises the novel issues of whether, on a transnational transfer, an employee is automatically entitled to insist on moving under TUPE. The assumption has always been that the employee is entitled to insist on a move. But in *Xerox*, the EAT pointed out that this depends on the terms of the employment contract. The employee is entitled to transfer under TUPE to a new employer, but only on the employee's present terms and conditions. In this case, the employee was employed to work in Leeds/Wakefield and not in Manilla. He could not, therefore, unilaterally insist on a change to his employment contract to allow for this change of location.

The employment judge had sought to resolve this issue by finding a variation of the employment contract entitling the employee to move to Manilla. There was no evidence of such a variation. The employer was insistent that if the employee were to move, local Manilla terms and conditions would apply. Nor did the employee have any unilateral contractual right to change his place of work. On that basis, the true reason for dismissal was redundancy, as the requirement for an employee was to carry out work of a particular kind in the place where the employee was employed, had ceased (see Employment Rights Act 1996, section 139 (1(b)).

The EAT concluded with a reminder that notwithstanding the availability of redundancy as a reason for dismissal, in a case like this, an employment tribunal must always address the terms of Regulation 7 of TUPE. Regulation 7(1) provides that if the sole or principal reason for the dismissal is the transfer, the dismissal is automatically unfair unless the sole or principal reason for the transfer, under Regulation 7(2), is an economic, technical or organisational reason, entailing a change in the workforce. If the latter applies, the reason for dismissal will either be redundancy (as in the present case) or "some other substantial reason" and the employment tribunal may examine the fairness of such dismissal under the general principles of section 98(4) of the Employment Rights Act 1996.

Interestingly, we are reminded that, prior to the changes made by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, a dismissal occasioned by a change of location on a TUPE transfer would be automatically unfair and Regulation 7 (2) would not apply. This is because the Courts declined to recognise that a change of location was a change in the workforce for the purposes of the economical, technical or organisational reason entailing a change in the workforce. Of course, in relation to TUPE transfers that take place on or after 31st January 2014, the position is different. In Regulation 7(3A) of TUPE, it is now provided that the expression "changes in the workforce" includes a change in the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer. In other words, changes of location dismissals are no longer automatically unfair under TUPE (although they must be fair within the meaning of section 98(4) of the ERA 1996).

TUPE and personal injury liability

Regulation 4 of TUPE transfers to a transferee all rights, powers, duties and liabilities under or in connection with a transferring employee's contract of employment. In *Bernadone v Pall Mall Services Group Limited* [2001] ICR 197 the Court of Appeal confirmed that a liability in connection with the employment contract included liability for the form of negligence, that is to say for personal injury. This was illustrated in the recent High Court case of *Baker v (1) British Gas Services (Commercial) Limited (2) J&L Electrics Lye Limited*. Mr Baker was an electrical engineer working for British Gas. In 2012 he was sent to a client's premises to do electrical repair work. Whilst working with a light, he was electrocuted, had a cardiac arrest and was thrown to the floor, thereby suffering serious personal injury.

Prior to October 2010 he had been employed by Connaught Compliance Electrical Services Limited (CCES). In October 2010 there was a TUPE transfer of that business to British Gas. In his claim for personal injury he sued not only British Gas, but also claimed that CCES was also responsible for personal injury because of the electrical work it had carried out on the lights concerned, and in particular, he alleged that periodic inspections undertaken by CCES before his employment with British Gas, and his accident, were a cause of the injury concerned. The case raises a fascinating issue of whether British Gas was liable for any breaches of duty by CCES occurring prior to the transfer, even though the personal injury concerned did not take place until after the transfer. The High Court held that liability for CCES' breach of duty, occurring before the TUPE transfer, did transfer under TUPE.

The employer argued that the transferee could not be liable for a breach of duty which occurred before the transfer when the injury was only sustained after the transfer date. This was rejected by the High Court: “the Regulations are not designed to protect the transferee from unknown liabilities”. On the contrary, said the Court, where there has been a breach of an employer’s duty before the transfer, but the injury occurs after the transfer, this squarely falls under TUPE. Regulation 4(2)(b) specifically provides that: “any act or omission before the transfer is completed, in relation to the transferor in respect of [the contract of employment] shall be deemed to be an act or omission in relation to the transferee”.

Therefore, British Gas was liable to Mr Baker for the breach of duty which occurred in the failure to detect and remedy a defect in the wiring prior to the accident, and in particular during a 2010 period inspection. Amanda Yip QC, sitting as a deputy judge of the High Court stated: “it is quite clear from this that tortious liabilities transfer, whether they are fully accrued or contingent. To hold that an employee who is injured after the transfer, but as the result of a breach of duty committed before the transfer, cannot recover against the transferee would frustrate the whole purpose of the Regulations and the underlying Directive”.

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