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Employment Law BULLETIN

Welcome to our October employment law bulletin.

The Court of Appeal has now handed down its judgment in the long running case of *British Gas Trading Ltd v Lock*. The Court of Appeal has confirmed that employers should take contractual results-based commission into account when calculating holiday for the four weeks of 'Euro leave' under regulation 13 of the Working Time Regulations 1998.

In *Buchanan v Commissioner of Police of the Metropolis,* the EAT has ruled that, in defence of a claim for discrimination arising from disability, an employer must justify the way in which it applied a sickness absence policy to a disabled employee, rather than simply justifying the existence of the policy in general terms.

In *McFarlane and another v easyJet Airline Company Ltd* an employment tribunal has considered whether two breastfeeding mothers were the victim of an indirectly discriminatory practice when easyJet refused their flexible working requests to work shifts of restricted length.

In *Brierley and others v Asda Stores Ltd* an employment tribunal has determined, at a preliminary hearing, that a group of mainly female workers in Asda stores can choose, as comparators, a group of mainly male workers in Asda distribution depots for the purposes of their equal pay claims.

In *The Salvation Army Trustee Company v Coventry Cyrenians Ltd* he EAT considers the rule that, for a service provision change TUPE transfer, the activities carried on by a new provider must be fundamentally the same as the activities carried out by the previous provider. In an interesting footnote to this case His Honour Judge David Richardson comments that some kind of pre-determination procedure in TUPE cases might save the parties costs.

In *ALNO (UK) Ltd v Turner* the EAT has considered whether there was a business transfer under regulation 3(1)(a) of TUPE following the termination of a franchise by a franchisee. The EAT stressed that in business transfer cases the multi-factorial test laid down by *Cheesman v R Brewer Contracts Ltd* must be followed.

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.

What's new in employment law? Highlights of 2016 plus your 2017 HR planner

- Breakfast Seminar, 6th December 2016

And in conjunction with ACAS

Understanding TUPE: A practical guide to business transfers and outsourcing

- Full Day Conference, **Nottingham,** 7th November 2016

Understanding TUPE: A practical guide to business transfers and outsourcing

- Full Day Conference, **Newcastle upon Tyne,** 10th November 2016

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1: Government publishes response to consultation on public sector exit payments

At the end of September, the Government published its response to its recent consultation on exit payments in the public sector. In an attempt to make savings of up to £250 million per year, and to bring public sector exit payments into line with those in the private sector, the Government has announced that it intends (despite considerable opposition from contributors to the consultation) to move forward with its proposals, which include:

- a maximum tariff for exit payments based on three weeks' pay per year of service;
- a cap of 15 months' salary on redundancy payments; and
- a maximum salary for calculating exit payments (expected to be around £80,000).

Government departments must now produce proposals for reform and consult on these with employee representatives and trade unions with a view to agreeing changes within a nine month period. If Government cannot achieve its aims by these means within this timetable, it may consider primary legislation.

Separate to this consultation, draft legislation has already been published setting an overall cap of £95,000 on public sector exit payments and requiring high-earning public sector workers to repay their exit payments if they return to work in the public sector within 12 months.

2: Contractual results-based commission should be included when calculating holiday pay

The Court of Appeal has now handed down its judgment in the very long running case of ***British Gas Trading Ltd v Lock and another***. The judgment confirms that employers should take contractual results-based commission into account when calculating holiday pay for the four weeks of "Euro leave" under Regulation 13 of the Working Time Regulations 1998.

The case was brought by a number of employees, including Mr Lock, a sales consultant employed by British Gas. Around 60% of his remuneration was from results-based commission. During holidays, he was paid only his basic wage. As he was not able to earn commission during holidays, his wage for those months which included a holiday was considerably lower than for those months when he had not taken leave.

On a referral from the Employment Tribunal, the ECJ held that commission payments should be taken into account when calculating holiday pay in order that a worker is not deterred from taking holiday. The Employment Tribunal and subsequently the EAT held that commission and similar payments should be included in the definition of a week's pay for the purposes of the Working Time Regulations.

The Court of Appeal has now upheld these judgments while making clear that the decision only applies to contractual results-based commission and should not be applied more widely to other kinds of commission and bonuses.

It had been hoped that this appeal would bring clarity about the reference period to be used when calculating holiday pay. Should employers use the 12 week reference period set out in the Employment Rights Act 1996 when calculating a week's pay where a worker has variable hours? Or should a longer reference period be used to even out seasonal fluctuations? Unfortunately, the Court of Appeal did not determine this question.

This case does not change matters as far as employers are concerned as it confirms decisions made previously. It is possible that British Gas will appeal to the Supreme Court, at which point more clarity on reference periods may be forthcoming.

3: EAT considers objective justification of long-term sickness procedures

In ***Buchanan v Commissioner of Police of the Metropolis***, the EAT made clear that in defence of a claim for discrimination arising from disability, an employer must justify the way in which it applied a sickness absence policy to a disabled employee, rather than simply justifying the existence of the policy in general terms.

This case concerned a police officer who suffered from post-traumatic stress disorder (PTSD) and who was disabled for the purposes of the Equality Act 2010. His long term absence from work was managed under the police force's Unsatisfactory Performance Procedure. This procedure included three stages with assessment by managers at each stage allowing for discretion to be exercised on whether the employee should be taken to the next stage. An improvement notice giving deadlines for improvement could be issued under the procedure. Mr Buchanan was issued with an improvement notice at stage two of the procedure but he was not able to return to work in compliance with this notice due to his PTSD.

Mr Buchanan brought a claim for discrimination because of something arising from disability, arguing that he was treated unfavourably (by being issued with an improvement notice) because of his disability-related absences.

Employers may be able to justify discriminatory treatment of this kind if the treatment is a proportionate means of achieving a legitimate aim. The Employment Tribunal found that this unfavourable treatment could be objectively justified by the employer. This decision was based on the premise that the employer only had to justify having the procedure in order to justify the discriminatory treatment.

On appeal, the EAT remitted the case to the same Tribunal to reconsider whether the treatment could be justified by the employer. The EAT made a distinction between justifying having such a procedure in place and justifying the way in which managers had used their discretion in applying the procedure to Mr Buchanan. It made clear that the managers in this case had made decisions and taken action at each step of the process and that these decisions and actions were the treatment which had to be justified.

4: Employment Tribunal finds roster practices were indirect sex discrimination

In *McFarlane and another v easyJet Airline Company Ltd* ET/1401496/15 & ET/3401933/15, an employment tribunal considered whether two breastfeeding mothers were the victim of an indirectly discriminatory practice when easyJet refused their flexible working requests to work shifts of restricted length. It also considered whether the employer had breached its obligations under maternity protection legislation.

The claimants were cabin crew employed by easyJet. After they returned from maternity leave, they both put in flexible working requests, asking to work shifts of no more than 8 continuous hours in order to help them to continue to breastfeed. The employer refused the requests. The claimants' GPs confirmed that the women faced an increased risk of mastitis if made to work shifts longer than 8 hours. The claimants had time off sick and took unpaid leave. For a period,

easyJet did not offer them work of any kind and did not pay the women, but it eventually offered them alternative ground-based work.

The Employment Tribunal found that the women had suffered indirect sex discrimination as the provision, criterion or practice (PCP) of not allowing flexible shift arrangements put female employees in general, and these employees in particular, at the disadvantage of not securing a restriction to their duties. It deemed that they had been suspended from work on maternity grounds when easyJet offered them no work and that the claimants were entitled to pay for this deemed period of suspension. It also held that the women should have been more promptly offered suitable alternative work on a temporary basis.

Indirect discrimination can be defended by an employer if the discriminatory treatment is a proportionate means of achieving a legitimate aim. EasyJet attempted to justify its blanket ban on flexible arrangements for cabin crew, arguing legitimate aims of delivering its flying schedule and avoiding delays and cancellations. However, it failed to provide evidence of difficulties actually caused to the airline by allowing individual roster arrangements for staff. A witness for the employer conceded that allowing a few individual arrangements would probably not cause scheduling difficulties.

The Tribunal also clarified that it is not reasonable for an employer to ask an employee when she plans to stop breastfeeding.

As this is an Employment Tribunal case, it is not binding. However, it is a useful reminder that employers facing indirect discrimination claims will need good evidence to support their arguments in tribunal that a PCP is objectively justified. It is also a reminder of the rights of pregnant women, new mothers and breastfeeding mothers to be offered suitable alternative work and to be paid when suspended from work on maternity grounds.

5: Asda retail workers can compare themselves to depot workers in equal pay claims

In *Brierley and others v Asda Stores Ltd* ET/2406372/2008, an employment tribunal has determined at a preliminary hearing that a group of mainly female workers in Asda stores can choose as comparators a group of mainly male workers in Asda distribution depots for the purposes of the female staff's equal pay claims.

Asda argued that there was no one body responsible for the alleged inequality as its retail and distribution divisions each had delegated responsibility for setting pay. Considering EU law on the right to equal pay, the Tribunal found that the executive board of Asda Stores Ltd exercised control over both retail and distribution divisions of the company. It could therefore be a body responsible for inequality which could act to restore equal treatment.

The Tribunal also found that the depot workers could be comparators for the purposes of the Equality Act 2010. To qualify as a comparator under the Equality Act, the workers must work for the same (or an associated) employer and either work at the same establishment or under common terms. The Tribunal held that the retail and depot workers were employed by the same employer under broadly similar terms and that therefore the depot workers qualify as comparators.

More than 7,000 claimants involved in this multiple claim will now be able to proceed with their claims. It is estimated that the value of these claims could be over £100 million.

6: TUPE and the case for a “fast track” pre-determination procedures

In ***The Salvation Army Trustee Company v Coventry Cyrenians Limited*** (noted below) there was a long running and expensive dispute between two service providers as to whether there was a service provision change TUPE transfer between them. Both were charities. His Honour Judge David Richardson commented(at para 27) that it was unfortunate that two charities in receipt of public donations and tax payers’ money were involved in this kind of lengthy dispute with a significant drain on their resources. HHJ Richardson considered that some kind of speedy dispute resolution (whether by a “fast track” employment tribunal or by some form of agreed procedure to which the parties subscribed) is “highly desirable”. He said that:

> “It would enable the putative transferor and transferee – and employees – to know their position speedily. Quite apart from the expense incurred by the putative transferor and transferee, employees are left in real difficulty when disputes of this kind are not resolved.”

Attractive though this idea might seem at first glance, it will be difficult to devise a satisfactory system. HHJ Richardson conceded this:

> “I do not underestimate the problems in designing a system of speedy dispute resolution. It would require careful thought and the guarantee of a judge or arbitrator (I use the term in a non-technical sense) who has real familiarity with TUPE issues. It is not something that can easily be arranged by parties when a dispute of this kind actually arises. But it would be a better way of resolving disputes such as this than a ‘set piece’ employment tribunal occupying significant time and resources and producing a decision long after the events in question.”

HHJ Richardson’s comments may seem fresh and innovative. However, a pre-determination procedure was considered by the government in its proposals for reform of the 1981 TUPE Regulations published in September 2001 (Government Proposals for Reform: Detailed Background Paper: Employment Relations Directorate, Department of Trade and Industry, September 2001).

In paragraphs 119 to 123 the government considered the pros and cons of a pre-determination procedure. The paper recognised that this kind of procedure could be of direct benefit to employees and employee representatives as well as employers. And the government was not opposed in principle to the idea of introducing a pre-determination procedure of this nature. Nonetheless it had serious concerns regarding its practicability and potential for abuse.

For example, abuse could occur if employers came to use the procedure as a matter of course, simply to gain an authoritative “rubber stamp” for their proposals, or even as a cheap substitute for obtaining their own legal advice. Also, said the government, it might constitute an unacceptable additional burden on the tribunal system. A further consideration was that a procedure designed to settle disputes between employers would sit oddly with the tribunals’ main remit to determine complaints by employees about alleged infringement of their employment rights. If it were to work at all there would have to be some mechanism by which aggrieved employees or employee representatives could challenge decisions made under a pre-determination procedure, which would reduce the usefulness of such decisions as a means of achieving certainty.

Additionally, a decision under a pre-determination procedure could continue to be relied upon only on the facts on which it was based remain valid. It would always be open to an aggrieved employee or employee representative, in bringing a subsequent complaint under the Regulations, to argue that the earlier decision was no longer relevant as the employers involved had changed their plans in some respect by the time the transfer actually took place. It also considered that decisions under a pre-determination procedure might have to be subject to appeal, on a point of

law to the EAT and the higher courts. For these reasons (see para 123) the government rejected the proposal to introduce any "pre-determination" procedure in its 2001 analysis of the proposition.

To be noted however is the Presidential Guidance on Judicial Assessments in employment tribunal claims issued by the President of Employment Tribunals on 3rd October 2016. This non-binding assessment will usually be offered to parties at the end of any preliminary hearing concerning any employment tribunal claim. This is however not compulsory and not every case will be suitable for this initiative. TUPE cases, in particular, may not be suitable, in many cases, for this initiative due to the complexity of the evidence involved.

7: TUPE and service provision change: similarity of activities

By virtue of regulation 3(2A) of TUPE, for a service provision change, the activities being carried out by another person in succession to a previous provider (or client) must be activities which are "fundamentally the same" as the activities carried out by the person who has ceased to carry them out. This rule was introduced by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 and was a consolidation of a previous case law rule to this effect. This was the provision under consideration in the EAT case of ***The Salvation Army Trustee Company v Coventry Cyrenians Limited***.

Coventry Cyrenians Limited (CCL) is a charity. The claimant employees were employed by CCL in its adult services team. CCL had a main contract with Coventry City Council to provide a range of services to homeless people. This involved providing 25 units of accommodation over 10 sites as well as support work. This included assessment of potential service users, allocation to houses of multiple occupation, producing a support plan and supporting individuals under that plan. The Council had subcontracted its requirements for services to the homeless through a network of 22 separate contracts with different providers. It wanted to do away with these 22 separate contracts and merge the provision of homelessness and ex-offender support through a single point of access. It therefore tendered out a contract for this purpose.

It was awarded to The Salvation Army Trustee Company (SAT). For a while it seemed likely that CCL would be taken on by SAT as a subcontractor. But in the end this did not occur. SAT operated the service in a slightly different way, with an assessment centre or hub that dealt with all referrals. If the individual were to be supported by accommodation it would be in one of two large hostels. Support services could be delivered more efficiently at 2 sites than in accommodation over 10 sites. So support work did continue, but at 2 sites and not 10. There were other differences. For example, the service was provided to those over the age of 25 rather than over the age of 18, as was the case before. The service was to be delivered in supported accommodation for 112 days rather than the longer period (up to 12 months) which applied before. The usual hours of support workers also changed. At the employment tribunal hearing a key submission from SAT was that the services were no longer provided through what SAT described as "dispersed accommodation", that is to say that 10 multiple occupation sites that CCL operated in Coventry.

The employment judge described the activities prior to the putative service provision change as the "provision of accommodation based support for homeless men and women". He found that the claimant employees constituted an organised grouping of employees, having, as its principal purpose, the carrying out of these activities. The key issue was whether the activities carried out by SAT in succession to CCL were fundamentally the same as those carried out by CCL. The employment judge examined the differences above described but did not consider them fundamental. Nor, in particular, did he consider that the fact that so called "dispersed accommodation" was offered before and hostel accommodation offered afterwards, constituted a fundamental

difference in the activity. The employment judge therefore concluded that the activities that CCL ceased to carry out on behalf of Coventry City Council were fundamentally the same as the activities carried out instead by SAT on behalf of the Council.

On appeal, SAT argued that the employment judge's description of the activities concerned was too general and simplistic. As to the meaning of activities, he needed to derive support from *OCS Group UK Limited v Jones* UKEAT/0038/09 (where a distinction was made between the provision of food via a restaurant and the provision of food via cold cabinets and a conclusion reached that the two activities were not fundamentally the same). The EAT however considered that the employment judge had approached the question correctly. The word "activities" in regulation 3(1)(b) of TUPE was to be given its ordinary, everyday meaning. And in the context of regulation 3(2A), "activities" must be defined in a common sense and pragmatic way. On the one hand, they should not be defined at such a level of generality that they do not really describe the specific activities at all (thus, referring to *OCS Group* it would be wrong to characterise a fully catered canteen as merely the provision of food to staff). On the other hand, the definition should be holistic having regard to the evidence in the round, avoiding too narrow a focus. A pedantic and excessively detailed definition of "activities" would risk defeating the purpose of the SPC provisions.

According to the EAT the employment judge "[steered] a correct course between the dangers of over generalisation and pedantry". Nor did the employment judge go wrong by asking whether there were fundamental "differences" between the services concerned, as opposed to assessing whether they were "fundamentally the same". SAT's contention on this point was also rejected by the EAT. Thus, said HHJ Richardson:

> "I consider that it is entirely plain from the employment judge's reasons as a whole, and from paragraph 37 in particular, that he used the language of "fundamental difference" in antithesis, in direct opposition, to the phrase "fundamentally the same"."

The judge used the terms in question as direct opposites and "he never strayed from the correct legal test".

8: Business transfers and the "multi-factorial" approach

In ***ALNO (UK) Ltd v Turner*** the EAT considered whether there was a business transfer under regulation 3(1)(a) of TUPE following the termination of a franchise by a franchisee.

ALNO is part of a group of companies that produces a range of kitchens under the name and style "In-Toto". Its business model is to enter into franchise agreements with third parties. It operates only a small number of outlets itself. SJM Kitchens and Bathrooms Ltd was a franchisee in Brighton. Its business was about 60% In-Toto kitchens and about 40% bathrooms made by other manufacturers. The claimant was employed by SJM in the Brighton showroom.

The owner of SJM, Mr Mant, decided that he would give up the franchise business and return to work as a self-employed fitter. So he told ALNO that SJM would not be seeking a renewal or extension of the franchise when it expired in late December 2014. In the meantime, the claimant went on maternity leave in July 2014. Initially ALNO decided that it wanted to keep on the showroom itself as an outlet which it would operate in succession to the franchisee. Mr Mant and the Claimant would be ALNO employees.

Two things then changed. First, Mr Mant and ALNO were unable to reach terms, so Mr Mant dropped out of the picture. ALNO's occupation of SJM's premises was delayed because of structural problems with the premises and it was unclear, by the time of the employment tribunal hearing, when ALNO would operate the showroom itself. In the meantime, the

claimant's maternity leave finished and there was a dispute whether she had transferred to ALNO under TUPE. SJM's position was that there was a TUPE transfer by the end of December 2014 when the franchise expired. This was mainly on the basis of the intention on the part of ALNO to operate the showroom itself (even though this had not happened by the time of the tribunal hearing). The employment judge considered, in particular, the cases of *Wood v Caledon Social Club Ltd* UKEAT/0528/09 and *P Bork International a/s v Junckers Industrier a/s* [1989] IRLR 41 (two cases, one in the EAT and one in the European Court, where a temporary sensation of the business was not fatal to a transfer of an undertaking).

ALNO appealed. ALNO argued, first, that the employment judge had failed to make the multi-factorial assessment of the situation required by *Cheesman v R Brewer Contracts Limited* [2001] IRLR 144. Secondly, the employment judge singled out and treated as decisive the intention of the parties that a transfer would take place. The employment judge, ALNO suggested, also misunderstood the position as regards to goodwill, asserting that any goodwill reverted to ALNO, whereas, under the franchise agreement, goodwill always remained vested in ALNO.

The EAT agreed that the employment judge had gone wrong, in particular in not applying the multi-factorial approach of the EAT in *Cheesman*. There were a number of factors which should have been taken into account. First, it was wrong to describe the business as one of 'selling In-Toto kitchens'. The business was not actually selling retail items from a showroom. It involved the design and installation of the kitchens. Mr Mant, the prime mover in the franchise, and the person responsible for installation, was not taken on by ALNO. And it was presumed he had tools, equipment and a vehicle. These were not taken on by ALNO.

And although it was correct that, according to *Wood and Bork*, a temporary cessation of work, of itself, will not negate a transfer, here ALNO had not occupied the premises at all by the time of the employment tribunal hearing because of the structural defect in the premises. The duration of any stoppage is a highly material factor and the facts in this case were quite different from the facts in *Wood and Bork* where the stoppage was of a very temporary nature.

This case emphasises that in any business transfer case falling under regulation 3(1)(a) (as opposed to a service provision change under regulation 3(1)(b)) the multi-factorial approach in *Cheesman* must always be applied.

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