WRIGLEYS
SOLICITORS

SEPTEMBER 2016

Employment Law BULLETIN

Welcome to our September employment law bulletin.

We cover a number of interesting cases this month.

We consider the National Minimum Wage rules and case law in the light of a recent well-publicised multiple claim against a care provider.

In *CT Plus (Yorkshire) CIC v (1) Black (2) Lincolnshire Road Car Ltd t/a Stagecoach* the EAT held that a TUPE transfer had not taken place when a bus company began to offer a non-subsidised bus route on a route previously run on a subsidised basis by a contractor on behalf of the council. Key to the decision was the fact that the client had changed and the new bus company used its own buses.

The EAT case of *G4S Cash Solutions (UK) Ltd v Powell* suggests that in some circumstances, long-term pay protection on moving to a demoted role might be a reasonable adjustment as part of a package of measures to keep a disabled employee in work.

The recent Employment Tribunal case of *Brettle v Dudley Metropolitan Borough Council,* has held that payments for work which is accepted voluntarily by the employee, rather than being compulsory, should count as normal remuneration if they are regularly part of the employee's pay. The payments in question in this case included voluntary overtime, stand-by allowances and call-out payments. This case is not binding as it is a first instance decision but it applies recent EAT and ECJ decisions on this issue.

The EAT has provided further clarity on the workings of the ACAS Early Conciliation (EC) process in *Compass Group UK & Ireland Ltd v Morgan.* It held that a claimant could rely on an EC certificate issued two months before her resignation when bringing a constructive unfair dismissal claim. This is one of a number of cases which suggest that tribunals will be fairly lenient to claimants when considering whether the matters raised in a claim are covered by the EC certificate.

The Pensions Ombudsman ruled in *Determination in a complaint by Mr N* that an employer was not subject to the implied duty to take reasonable steps to inform an employee about a contractual term so that she could take advantage of it (the Scally duty). It held, in relation to a reduced death in service benefit, that the employee had been informed about the benefits of remaining an active member of the pension scheme and could have been expected to know of these advantages.

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

Click any event title for further details.

Charity Governance Seminar 2016

- Full Day Conference, **Leeds**, 13th October 2016

Redundancy and Restructuring: A Practical Guide

- Breakfast Seminar, **Leeds**, 18th October 2016

And in conjunction with ACAS

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

- Full Day Conference, **Hull**, 20th October 2016

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

Dr John McMullen, EDITOR **john.mcmullen@wrigleys.co.uk**

Contents

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

1: Care workers bring NMW claim against care contractor

It has been reported that a group of 17 care workers on zero hours contracts have brought claims in the Employment Tribunal against care contractor, Sevacare.

The workers claim that they have been required to work 24 hours a day over a period of seven days to care for vulnerable people in their own homes and that they have not been paid the National Minimum Wage (NMW) for those hours. They state that they are required to stay in the service-user's home at all times, sleeping often in the same room as the service-user and having to get up to look after the service-user regularly during the night. They calculate that their hourly rate is £3.27 per hour. The NMW for those aged 25 and over (the National Living Wage) is £7.20 per hour.

The employer has stated that it pays the workers over the NMW as they actually work for only 10 hours a day and are paid £550 for a seven day period (which would make the hourly rate £7.85 per hour).

Under the NMW rules, a worker who is paid by reference to the time they work is entitled to be paid at least the NMW for any time during which they are actually working or for any time during which they are available and required to be available at or near a place of work, however, a worker who is not actually working but is available for work will not be entitled to the NMW for that time if they are at home or not awake for the purposes of working. Where this exemption applies, only the time spent responding to calls during the night will be taken into account.

Recent case law suggests that a tribunal will decide that a worker is actually working and so is entitled to the NMW (even if the worker is asleep for some of the time) if:

- it would be a disciplinary matter if the worker was found to be absent during the sleep-in hours;
- the worker's presence on the premises during the night fulfils a legal obligation of the employer; and
- it is the worker's job simply to be there and he or she is being paid just to be present.

The workers have also brought claims alleging that they were not paid the NMW taking into account travel time between assignments. It has been established in recent case law that time spent travelling between assignments during the day should be counted when calculating whether NMW is being paid.

2: ACAS amends guidance on dress codes

ACAS has updated its non-statutory guidance about dress codes in the workplace in the light of new research. The guidance and the new research on this subject are available *here.*

Employer attitudes to tattoos are considered in the research, with ACAS suggesting that a ban on visible tattoos could mean organisations are missing out on talented young employees. This is in the context of statistics which suggest that around one third of 16 to 44 year olds have a tattoo. However, the research shows that some public sector workers feel that people would not have confidence in the professionalism of a person with a visible tattoo. There is also concern from the private sector about perceived negative attitudes of potential clients or customers when dealing with staff with visible tattoos or body piercings.

The guidance reminds employers that any dress code must not discriminate against employees by disadvantaging a group of people sharing a particular protected characteristic. Employers are advised, for example, that dress code rules should not be stricter, or lead to a detriment, for one gender over the other. The recent press story about a temporary receptionist who was sent home without pay for refusing to wear high heels has highlighted the fact that some dress codes may be more disadvantageous to women than men.

ACAS advises that employers should consider the reasons behind dress code rules when drafting or updating them. It also states that consulting with employees over any proposed dress code is good practice and may help to avoid disputes.

3: Trade union survey on attitudes to zero hours contracts

Unite has published the results of a survey of workers concerning confidence in the British labour market. According to the statistics, 64% of workers questioned would like zero hours contracts to be abolished. Employees from both sides of the political spectrum were questioned, with 55% of Conservative voters and 71% of Labour voters supporting abolition.

Current figures suggest that over 800,000 people work under zero hours contracts in the UK.

Since 26 May 2015, any clause in a zero hours contract which prohibits a worker from working for a different employer is void. Workers can also now (since 11 January 2016) bring claims in the Employment Tribunal where they have been dismissed or suffered a detriment because they have breached an exclusivity clause by working for another employer. However, there is currently no prohibition on entering into contracts of employment with no guaranteed hours.

4: TUPE, Service Provision Change and the "same client" rule

In ***CT Plus (Yorkshire) CIC v (1) Black (2) Lincolnshire Road Car Ltd t/a Stagecoach*** the facts were as follows.

CT Plus ran a 'park and ride' service under a contract with the local Council, by virtue of which it received a subsidy. Lincolnshire Road Car Limited trading as Stagecoach had tendered unsuccessfully for this contract at the time it was awarded by the Council.

However, there is nothing to stop a commercial company setting up a commercial service on the same route as a subsidised company, provided the relevant notification is given to the Vehicle and Operator Service Agency (VOSA). If that happens, the Council subsidy has to cease and the operator of the subsidised service can decide whether to continue the service without subsidy if it can afford to do so.

Stagecoach had an extensive depot in Lincoln with a large route network. It was much bigger than CT Plus. It took the view that it could run the service commercially without a subsidy and it obtained approval from the VOSA. As a result the Council gave notice to CT Plus to terminate the subsidised contract.

CT as a result stopped the service and Stagecoach began to operate the service instead.

Stagecoach provided its own buses and took over nothing directly from CT Plus. It also refused to take on the CT Plus drivers. It denied there was a service provision change under TUPE within the meaning of Reg 3(1)(b) of TUPE.

The Employment Tribunal, with which the EAT agreed, held there was no service provision change. For the purposes of a service provision change the client for whom the services are provided (here the Council) must remain the same. Although services were originally provided by CT Plus to the Council in a provider/client relationship, Stagecoach was not a service provider to the Council. Services taken over by a new provider must be for the same client. This was not the case here.

Although this further aspect did not feature in the case there would have been "formidable" difficulties finding there was a business transfer under Reg 3(1)(a) of TUPE. For a business transfer there would need to be a transfer of significant tangible or intangible assets (if the function were asset reliant) or failing that, a taking over of a major part of the workforce in terms of numbers and skills (if it were labour intensive). But as a bus service is an asset-reliant undertaking (as pointed out by the European Court in Oy Liikenne Ab v Liskojärvi [2001] IRLR 171) the fact that Stagecoach did not take over the buses used by CT Plus was fatal to the application of TUPE.

5: Pay protection was a reasonable adjustment for disabled employee

In ***G4S Cash Solutions (UK) Ltd v Powell,*** the EAT held that indefinitely protecting the pay of a disabled employee following his transfer to a more junior role was a reasonable adjustment in the circumstances.
Mr Powell worked as an engineer maintaining ATM machines until he developed back problems and could not manage the physical aspects of the job. His condition was a disability for the purposes of the Equality Act 2010. His employer moved him to a more junior role and continued to pay him the same salary for 12 months. G4S then decided to make the role permanent but to pay a lower salary to reflect the less skilled nature of the role. Mr Powell did not accept the reduction in pay and was dismissed.

Mr Powell claimed in the Employment Tribunal that his contract had been permanently varied when he was transferred to the new role and that the employer had failed in its duty to make the reasonable adjustment of protecting his pay in the new role indefinitely. He also brought a claim for unfair dismissal.

The Employment Tribunal did not find that Mr Powell's contract had been varied but it did find that G4S were required to pay Mr Powell at his former salary level as a reasonable adjustment to overcome the disadvantages of his disability. The Tribunal found that he had been unfairly dismissed.

The EAT agreed that it was reasonable in the circumstances for G4S to be required to maintain the original salary. It disagreed with the Tribunal in part, holding that Mr Powell's contract had been permanently varied when he moved to the new role on the same pay rate.

The EAT clarified that an employee is entitled to decline a reasonable adjustment proposed by the employer which would amount to a change to the contract and that the adjustment will not be an effective variation of contract without agreement.

The EAT commented that the provision of long-term pay protection by an employer will not be an "everyday event" but that, in some circumstances (as here), it would be reasonable for pay to be protected as part of a package of measures to keep the disabled employee in work. The particular circumstances which were influential in this case were: the salary for the new role had already been paid at the protected rate for a year; and the employer had substantial resources and could afford the higher pay rate.

6: Holiday pay should have included voluntary overtime, stand-by allowances and call-out payments

In ***Brettle v Dudley Metropolitan Borough Council ET/1300537/15,*** the Employment Tribunal found that payments for voluntary overtime, stand-by shifts and call-out payments should have been included in normal pay when calculating holiday pay.

The case concerned employees of Dudley Metropolitan Council whose holiday pay was calculated without taking into account payments made for voluntary shifts. They brought claims for unlawful deductions from wages in the Employment Tribunal.

The Tribunal followed the principle in the ECJ case of *Williams and others v British Airways plc* [2011] IRLR 948, that workers should not be deterred from taking holiday because of the way holiday pay is calculated. It also applied the test in the EAT case of Bear Scotland Ltd v Fulton and others UKEAT/0047/13 that normal remuneration is pay which is normally received. It concluded that the payments should have been included in the holiday pay calculation where these payments were consistently and regularly received. In the case of one employee, the Tribunal held that such payments were made so rarely that they could not be said to be part of normal pay.

The Tribunal also held that these payments need only be included for the purpose of calculating pay for the four weeks of annual leave set out in the European Working Time Directive. In theory, employers could exclude such payments when calculating holiday pay relating to the extra 1.6 weeks' annual leave under the UK Working Time Regulations. However, such distinctions may be difficult to make in practice.

This case is not binding as it is a first instance decision but it follows recent decisions in the EAT and reflects the Northern Ireland Court of Appeal case of *Patterson v Castlereagh Borough Council* [2015] NICA 47. It confirms that payments for work which is accepted voluntarily by the employee, rather than being compulsory, will count as normal remuneration if they are regularly part of the employee's pay.

Judgments in the further appeal cases of *Lock and others v British Gas Trading Ltd and another* (which concerns the inclusion of results-based commission in holiday pay) and Bear Scotland are expected this Autumn.and could afford the higher pay rate.

7: ACAS Early Conciliation Certificate did extend to matters which took place after it was issued

In ***Compass Group UK & Ireland Ltd v Morgan***, the EAT held that a claimant could bring a claim of constructive unfair dismissal despite the fact that her resignation occurred more than two months after the Early Conciliation (EC) certificate was issued.

Mrs Morgan alleges that she was instructed by her employer in September 2014 to work at a different location and in a less senior role. She raised an internal grievance about this in October 2014 and began the EC process in November 2014. The EC certificate was issued on 3 January 2015. Mrs Morgan's employment did not end until she resigned on 18 March 2015. She filed a claim with the Employment Tribunal two days later.

The Employment Tribunal found at a preliminary stage that it had jurisdiction to hear the claim even though the resignation post-dated the EC process and certificate.

On appeal, the EAT upheld the Tribunal's decision. The EAT commented that the language used in the EC legislation is deliberately broad. The legislation refers to a prospective claimant having to provide prescribed information to ACAS relating to a "matter" before a claim relating to that "matter" can be brought. There is no obligation to inform ACAS of a potential claim or cause of action as part of the EC process before bringing that claim to a tribunal.

Allowing the case to proceed, the EAT held that there was sufficient connection in this case between the matters which were the subject of the EC process and the claim which was eventually brought.

There has been considerable uncertainty about the way the EC process works in practice and whether claimants can later bring claims which are not raised during the process. This case suggests that a tribunal will consider as a question of fact whether matters in the claim form relate to matters raised during the EC process, whenever they occurred, and will take a broad and pragmatic approach.

8: Discrimination: Employment Tribunals can increase injury to feelings award bands in line with inflationy

In *Determination in a complaint by Mr N*, the Pensions Ombudsman dismissed the complaint of a widower of a teacher who had opted out of the Scottish Teachers' Superannuation Scheme a year before her death.

Mr N argued that his late wife would not have opted out of the scheme if she had been properly informed that the death in service benefit of a deferred member was around half that of an active member of the scheme. He contended that information given to his late wife led her to believe that the death in service benefit would remain the same following her opt out.

The Pensions Ombudsman held that the administrators of the pension scheme were not in breach of any duty. It also held, considering the case of *Scally v Southern Health Board* (1992), that the employer, Dundee City Council, had not breached the employment contract.

The case of Scally established that there is, in limited circumstances, an implied duty in the contract of employment for an employer to take reasonable steps to inform an employee of a contractual term in order that they may take advantage of it. The duty only arises in particular circumstances, one of these being that the employee could not reasonably be expected to know about the term unless the employer draws their attention to it.

In this case, the Ombudsman found that the teacher had been informed of the benefits of being an active member of the scheme and had signed a declaration that she had read the guidance and understood the potential benefits.

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