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Employment Law BULLETIN

Welcome to our June employment law bulletin.

On the news front, we detail the limited agenda for change (from an employment law point of view) in the Queen's speech. We also highlight the changes this month to the right to flexible working.

In *Bollacke* the European Court has confirmed that a deceased worker's entitlement to pay in lieu of untaken holiday must be paid to his estate. The Supreme Court has in *R (on the application of T and Others) v Secretary of State for the Home Department* ruled that the compulsory disclosure of all criminal records was a breach of human rights.

In *Hainsworth v Ministry of Defence* the Court of Appeal has considered the duty to make reasonable adjustments in the context of disability under the Equality Act 2010. And in the EAT there are interesting cases on employment status and TUPE.

Our client briefing this month is on the subject of changing terms and conditions of employment.

May I remind you of our forthcoming events:
Click any event title for further details.

Hot Topics in Pensions for HR Managers
· Breakfast Seminar, 5th August 2014

and in conjunction with ACAS in the North East:

Understanding TUPE: a practical guide to business transfers and outsourcing
· A Full Day Conference, 30th July 2014

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

Click on any of the headings below to read more

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

1. Government plans set out in Queen's Speech

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On 4 June 2014, the Queen's Speech revealed some of the changes which may impact on employers and employees in the near future.

The proposals in the Small Business, Enterprise and Employment Bill include: the introduction of tougher penalties for employers breaching the National Minimum Wage regulations; restrictions on the use of exclusive zero hours contracts; new measures to limit excessive redundancy payments for highly paid employees in the public sector; and more flexible childcare regulations.

National Insurance plans include strengthening anti-avoidance rules by tackling schemes involving employment intermediaries and simplifying the collection of National Insurance contributions made by self-employed people.

The Private Pensions Bill aims to introduce continental-style "collective schemes" for pensions, which spread the risk between members in order to provide more stability and certainty.

It was also announced that the total number of apprenticeship places (to include more degree level or "higher" apprenticeships) will be increased to two million by the end of the Parliament.

2. Changes to the right to request flexible working

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Important changes to the right to request flexible working arrangements will come into force on 30 June 2014. The aim of these changes is to extend the right to all employees and to remove some of the procedural burden of the old legislation.

Under the amended law, all employees who have worked continuously for their employer for at least 26 weeks will be eligible to make a flexible working request. There will no longer be a requirement to be a carer of a child or adult and the employee need not state the reason for the request.

Once the request is received, the employer has a period of three months in which to respond to the request. In place of the former procedural steps and timetable, there is now simply a duty on the employer to deal with the request in a reasonable manner. An employer need not, for example, allow the employee to be accompanied to any meetings, and there is no statutory right to an appeal if the request is refused. However, employers may consider retaining some of these procedural aspects to assist with the requirement to deal reasonably with the request.

Additionally, the amended legislation allows the employer to consider the request to have been withdrawn where an employee misses both a discussion/appeal meeting and the rearranged meeting. After an employee has submitted a request for flexible working, he or she will be unable to submit a new flexible working request for twelve months (no matter whether the request was accepted, refused, withdrawn or deemed to be withdrawn).

3. The compulsory disclosure of all criminal records ruled to be a breach of human rights

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In *R (on the application of T and others) v Secretary of State for the Home Department and another*, the Supreme Court determined that the Court of Appeal was right to declare that the need to disclose all convictions and cautions is incompatible with Article 8 of the European Convention on Human Rights.

Under the current law, convictions (except those carrying sentences of over 30 months), cautions, warnings and reprimands will expire after a period of time, becoming "spent". Any spent conviction etc. need not be disclosed. However, Criminal Record Certificates include all spent convictions etc. where the subject will be required to work with children and/or vulnerable adults. Enhanced Criminal Record Certificates also include any information reasonably considered by a chief police officer to be relevant.

The cases reviewed concerned young people who had applied for employment or university places. They had both received warnings or cautions for minor dishonesty offences some years in the past. On applying for employment or study, the "spent" warnings and cautions were disclosed as the work in question involved children and vulnerable adults.

The Supreme Court decided that enforcing disclosure of *all* non-serious offences was a disproportionate means of pursuing the legitimate aim of protecting the public and vulnerable people in particular, and that a balance should be struck between the rights of the worker and the need to protect others. Including spent convictions for serious offences, on the other hand, was seen to be a proportionate measure.

The Government has already brought in amending legislation which filters out the disclosure of some old, minor and irrelevant offences from and narrows the content of criminal record checks.

4. Deceased workers entitled to pay in lieu of untaken holiday

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In *Bollacke v K + K Klaas & Kock B.V. & Co. KG* (C-118/13) the European Court of Justice has determined that pay in lieu of untaken holiday should be paid to the estate of a deceased worker.

In this case a German worker, Mr Bollacke, became seriously ill and was unfit for work for several months. During this time, he accrued a substantial amount of untaken holiday. After his death, his widow made a claim for pay in lieu of that untaken holiday. The claim was rejected by the national court at first instance and at appeal the matter was referred to the ECJ for an opinion.

The ECJ held that the Working Time Directive (2003/88/EC) sets out a clear principle. Payment in lieu of any untaken accrued holiday must be given to workers when they leave employment (including holiday which has accrued while a worker is unfit for work due to sickness). The death of a worker does not change matters. The employer must therefore pay to the estate a payment in lieu of the deceased worker's untaken holiday.

5. Duty to make reasonable adjustments under the Equality Act 2010

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The Equality Act 2010 imposes a duty on an employer make adjustments to ensure that an "interested disabled person" has access to employment and/or training as long as this does not impose an unreasonable burden on the employer.

In *Hainsworth v Ministry of Defence*, the Court of Appeal considered whether this duty extended to a duty to make reasonable adjustments for a non-disabled worker with a disabled child.

The employee in this case was a British teacher employed by the Ministry of Defence in Germany. The Ministry of Defence provided schooling for the children of its employees who were stationed overseas. However, the schooling available was not

appropriate for the needs of Ms Hainsworth's daughter who had Down's Syndrome. Ms Hainsworth requested a transfer to the UK to enable her daughter to receive appropriate schooling; but her request was refused. Ms Hainsworth brought a claim under the Equality Act 2010 on the grounds that her employer should have made the reasonable adjustment of allowing her transfer to the UK due to her association with a disabled person (her daughter).

The Court of Appeal stated that the purpose of the Equality Act and the European Directive it implemented was to ensure that prospective applicants, applicants and employees were given equal access to employment and training. The duty to make reasonable adjustments is a duty which is focused on the relationship between an employer and a disabled applicant or employee. It does not apply where there is an association between the employee and a disabled person.

This case does not alter the fact that direct discrimination and harassment claims based on association with a disabled person may be successful. Nor does it preclude female employees from bringing sex discrimination cases where they are disadvantaged due to their responsibility to care for a child who may be ill or disabled.

6. No employment contract if no remuneration

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In *Ajar-Tec Limited v Stack* the EAT determined that there can be no binding employment contract where there is no payment for work done.

The case concerned Mr Stack, a majority shareholder and director of a company. Though a draft employment contract was prepared, his employment status was never formalised. Nor did he seek payment for his work as a director. When Mr Stack's directorship was terminated, he brought a claim before an employment tribunal for constructive unfair dismissal and unauthorised deductions from wages.

At first instance, the tribunal found an implied contractual term that Mr Stack would be paid for his work. It also found that Mr Stack was an employee of the company. On appeal, the EAT stated that it is not possible to imply a term into a contract where no contract exists. The existence of a contract must be the *first* question to answer, before going on to consider implied terms or employment status.

Where individuals may be considered to work for an organisation but no written contract exists, it is advisable to formalise the relationship. Even though a contract must be in place before the rights accorded to employees or workers come into play, organisations should be alert to the fact that a tribunal may consider a contract to exist and may imply terms as necessary to give effect to the reality of the situation. Where an individual is receiving payment, a contract is likely to be found.

7. TUPE: Change of workforce location and the ETO reason for dismissal

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It is not uncommon, on a TUPE transfer, particularly in relation to service provision change, for the business or service to be carried on at a different place following the transfer of an undertaking. If the new place of work is sufficiently different from the old place of work, employees (subject to any mobility clause in their contracts) may be able to claim constructive dismissal. They would be entitled to a redundancy payment since there is a cessation of the requirement for work of a particular kind "at the place where [they] are employed".

But outside the context of TUPE, it would be rare that such a dismissal would be regarded as unfair, particularly if the employer gave consideration to mitigating the effects of relocation and duly informed and consulted. But until this year, before the amendments made to the Transfer of Undertakings (Protection of Employment) Regulations 2006 by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, such a dismissal would be automatically unfair. This is because such a dismissal is necessarily because of the transfer. The only way for the employer to avoid automatic unfair dismissal under TUPE, regulation 7(1), is to argue that, under regulation 7(2), there is an economic, technical or organisational reason entailing changes in the workforce.

Hitherto the EAT had been unwilling to consider that a change in the place of work is

a change in the workforce. The long standing authority of *Berriman v Delabole Slate Limited* [1985] ICR 546 limited the meaning of "changes in the workforce" to changes in the "numbers and functions" of the workforce. So the ETO reason did not apply and any dismissal would be automatically unfair.

The facts in *RR Donnelley Global Documents Solutions Group Ltd v (1) Besagni and (2) NSL Ltd* were that the claimants were employed in the parking enforcement and related services department of the London Borough of Barnet. The Council decided to outsource the majority of its parking operations. It awarded a contract to NSL. NSL decided to transfer back office functions to its offices in Croydon. It also decided to subcontract part of the contract to another contractor, RR Donnelley (RRD). It was awarded the post room and payment processing operations part of the contract. RRD indicated that the payment processing services would move to Lancing, West Sussex.

The employees indicated that they were not prepared to move to Croydon and Lancing respectively. Both locations were a long way from Barnet. They were then dismissed on ground of redundancy.

An employment tribunal considered that the reason for their dismissal was the transfer. It also considered that there was an economic, technical or organisational reason for the change in location. But an economic, technical or organisational reason must always entail a change in the workforce. The employment tribunal, applying *Berriman,* decided that a change in location could not be a change in the workforce as the principle in *Berriman* confined the expression "entailing changes in the workforce" to a change in the numbers or functions of the employees looked at as a whole. The employees were therefore automatically unfairly dismissed.

On appeal to the EAT (Mrs Justice Slade presiding) the employers argued that *Berriman*, which concerned the constructive dismissal of an employee who refused to accept changes in his terms and conditions introduced to harmonise rates of pay, was not intended to cover the case of change of location. Clearly changes in rates of pay do not affect the workforce or its location but, it was said, a change of location was different and *Berriman* could not be authority for the proposition that only redundancies could amount to an ETO reason entailing changes in the workforce.

The EAT rejected the employer's appeal. Some meaning must be attributed to the words "entailing changes in the workforce", otherwise their inclusion, after "economic, technical or organisational reason" would be 'otiose'. According to Mrs Justice Slade:

> "In my judgment 'workforce' is made up of workers, people. 'Workforce' is not 'workplace' or any other physical or abstract concept such as the way in which workers are organised or where it takes place."

Some note was taken also of the amendment to regulation 7(2) made by the 2014 Regulations which now expressly provide that in relation to transfers on or after 31st January 2014 a change to the place where employees are employed can be a change in the workforce. There would be no need for this amendment if the contention for the employers were correct.

Nor had the employer-oriented approach of the European Court in *Alemo-Herron v Parkwood Leisure Ltd* (Case C-426/11) affected the position. That case did not alter the earlier jurisprudence on the mandatory nature of the obligations in Acquired Rights Directive. Therefore the employment tribunal was correct in finding that there was no ETO reason, because no changes in the workforce were entailed under the unamended version of the TUPE Regulations. The dismissals were therefore automatically unfair.

There are a couple of observations to be made. First it is commonly contended that only redundancy or redeployment can be an ETO reason for a reason entailing changes in the workforce. The EAT disagreed, adopting the view expressed in *Meter-U Ltd v Ackroyd* [2012] ICR 834 that:

> "Changes in numbers of employees or in their duties are not the only changes which may constitute 'changes in the workforce' within the meaning of regulation 7."

According to the EAT:

> "Whilst to fall within TUPE Regulation 7(2) the changes must be to the body of

people constituting a workforce, in my judgment they could also include, for example, a requirement that the workforce has additional skills or qualifications needed even if the jobs they perform remain the same. For economic or organisational reasons changes in the techniques to carry out existing jobs may be needed requiring the workforce to have additional skills. Dismissals of unskilled workers for that reason may arguably for an ETO reason entailing a change in the workforce within the meaning of TUPE Regulation 7(2)."

Finally, as stated, this case was decided before the changes made to TUPE by the 2014 amending Regulations and, now, a change in work place location is *deemed* to be a change in the workforce for the purposes of the ETO reason. The result would be different now. Perhaps disappointingly, the EAT declined to comment on whether the 2014 Amendment was consistent with the EU Acquired Rights Directive. There is no current European Court decision on the Acquired Rights Directive concerning whether a change in location is a change in the workforce for the purposes of an economic, technical or organisational reason entailing changes in the workforce. But there are suggestions in the decision that the law prior to 2014 was not inconsistent with European Court jurisprudence. The question remains, therefore, whether the UK is in breach of the Acquired Rights Directive by *deeming* a change in workforce location to be a change in the workforce for the purposes of the ETO reason.

8. Client Briefing: Changing terms of employment

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This client briefing sets out the key issues an organisation will need to consider when changing employees' terms of employment.

Why is it important to know the law when changing an employee's terms?

An employee's terms will usual alter during their employment (for example, their pay may increase). Most changes will be uncontroversial, but sometimes a business will want to do something that the employee is less willing to accept. In these cases, the organisation must understand how to make the change legally binding, whilst minimising any possible disruption.

Implementing a change to an employee's terms of employment

A contract can only be amended in accordance with its terms or with the agreement of the parties. However, not all changes during the employment relationship will require the contract itself to be amended. Some changes involve changes in practice, rather than in the terms, of the contract, and in other cases the contract will allow for the proposed variation. In most cases, it will be good practice to carry out a consultation process before changing any terms of employment.

Will the proposed changes affect the contract?

The organisation should first decide if its plans involve amending the contract itself. This involves identifying the existing terms of the contract, which may be:

- **Express:** terms explicitly agreed between the parties (either orally or in writing);
- **Implied:** terms may be implied for a number of reasons, for example through custom and practice;
- **Incorporated:** terms may be incorporated into a contract by law.

Some terms will not be part of the contract. For example:

- Benefits that are stated to be non-contractual;
- 'Policies' which merely provide guidance on how the contract will be carried out.

Is there a contractual right to vary the term?

If the proposed change will affect existing terms of the contract, the business will not need to amend the contract if:

- The existing terms are sufficiently broad to accommodate the organisation's proposals
- There is a specific right for the organisation to vary the contract in this way;
- The contract gives the organisation a general power to vary its terms.

However:

- Any ambiguity in the terms of the contract will be construed against the organisation;
- Any specific flexibility clauses will be given a restrictive interpretation by the courts and may be limited by an implied term (for example, am obligation to exercise the clause reasonably or the duty to maintain trust and confidence);
- General flexibility clauses can probably only be used to make reasonable or minor administrative amendments that are not detrimental to the employee.

Implementing a binding change in terms

If an organisations proposals involve altering the existing contract and there is no contractual right to make such a change, the organisation can consider the following options:

Express agreement

- The employee may agree to the organisation's proposals orally or in writing (although an oral agreement is clearly more vulnerable to challenge at a later date);
- For the contractual amendment to be binding, the employee must receive some form of benefit in return. In many cases the employee's continued employment will be sufficient, but there may be problems when the change does not have an immediate effect (for example, when the employee's rights on termination are altered).

Unilaterally imposing the change and relying on the employee's implied agreement

This strategy is more likely to be effective if there is an immediate practical effect on the employee (for example, a pay cut) and they continue to work without objecting. However, an organisation should not assume silence is sufficient to indicate implied agreement, especially if there is no immediate impact on the employee. If the organisation imposes the change it will be a breach of contract. The employee can:

- Comply with the new terms but work "under protest" and claim for breach of contract or (if their wages have been reduced) unlawful deductions from wages. Where the change imposed is substantial, the organisation may be deemed to have dismissed the employee, and therefore the employee may also bring a claim for unfair dismissal;
- Resign and bring a claim for constructive dismissal, if the change is sufficiently fundamental;
- Refuse to work under the new terms (for example, where there is a change in duties or hours).

Dismissing and offering reengagement on new terms

This approach avoids the risks involved in unilaterally imposing the change on the employee. However, as a result, the employee may be able to claim either:

- Wrongful dismissal, unless the organisation gives the appropriate period of notice (or makes a payment in lieu of notice);
- Unfair dismissal, unless the organisation can establish a potentially fair reason for dismissal and show that it acted reasonably in deciding to dismiss the employee for failure to agree the change.

A refusal to agree to a change in contracts will usually amount to some other substantial reason for dismissal, provided there is a sound business reason for the change.

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