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Employment Law BULLETIN

Welcome to our October employment law bulletin.

We note key changes in employment law which take effect from 1st October 2014. With an eye to the future, we summarise the proposals concerning employment law made by the political parties at their autumn party conferences.

The laws and regulations on family friendly rights tend to be complex and detailed. ACAS has published an admirably clear guide to shared parental leave and we summarise its contents.

In *The Commissioners for HM Revenue & Customs v Jones* the EAT considered whether livery stables trainees were apprentices for the purposes of the national minimum wage. In *Coventry University v Mian* the Court of Appeal determined whether an employer could be liable to an employee for breach of contract and/or negligence in initiating disciplinary proceedings without undertaking due enquiry.

There are two interesting cases on TUPE. In *Ejiofor t/a Mitchell & Co Solicitors v Sullivan* the EAT considered whether, for a TUPE transfer, the business concerned has to be a lawful business; and in *ALHCO Group Limited v Griffin* the EAT applied the requirement in TUPE that, prior to a service provision change, there must have been an organised grouping of employees and, in order to transfer, employees must be assigned to that grouping.

The European Court has, in *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich - Fachverband der Autobus, Luftfahrt und Schifffahrtsunternehmungen*, now ruled on the effect of collective agreements on terms and conditions of employment once, following the transfer of an undertaking, a collective agreement is terminated and not replaced.

May I also remind you of our forthcoming events:

Click any event title for further details.

What's New in Employment Law?
- Breakfast Seminar, 2nd December 2014

Key Issues in Employment Law and Practice
- Conference, London, 5th December 2014

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1: Key changes in employment law from 1 October 2014

The National Minimum Wage rates for all workers will increase under the National Minimum Wage (Amendment) (No. 2) Regulations 2014. The standard adult hourly rate has now increased to £6.50.

Tribunals now have the power to order equal pay audits under the Equality Act 2010 (Equal Pay Audits) Regulations 2014 if employers are found to be in breach of equal pay law.

Certain provisions of the Defence Reform Act 2014 (DRA 2014) have now come into force. There is now no need for an employee to have two years' continuous employment in order to bring a claim for unfair dismissal where that dismissal is connected with the employee's membership of the Reserve Forces. Provisions are now in force under which payments to small and medium-sized employers of reservists who are called up for service may be made.

The Children and Families Act 2014 has extended the right of employees and agency workers to accompany their pregnant partner to ante-natal appointments. The right allows employees or agency workers in a "qualifying relationship" with a pregnant partner to attend up to two ante-natal appointments, each lasting a maximum of six and a half hours.

The Public Interest Disclosure (Prescribed Persons) Order 2014 contains a new list of prescribed persons in England, Scotland and Wales to whom a whistleblower may now make a disclosure.

2: Autumn party conferences: proposals relevant to employment law

At its conference in late September, the Labour Party announced a number of proposals which may impact on employers. The Labour manifesto will include a proposal to raise the full adult rate of the National Minimum Wage to £8 an hour by the end of the next Parliament (in 2020). Proposed measures aimed at improving equality and diversity at work include requiring companies with more than 250 employees to publish the average pay of men and women at each pay grade and encouraging all companies to monitor the social background of their employees, in addition to current monitoring of race, gender and disability. It was announced that working parents with children aged three or four years old would be entitled to 25 hours' free childcare a week. It was stated that a Labour government would end the use of zero hours contracts and give tax breaks to firms paying workers a living wage. The Labour Party would also work with pay review bodies, employers and employees to ensure the fairness and affordability of pay settlements. "Equal rights" for the self-employed were announced by the Labour leader. Details of what this would entail have not yet been given.

At the *Conservative* conference in early October, the following proposals relevant to employers were announced. A British "Bill of Rights" was proposed. If passed, it is suggested that the Bill of Rights would replace the Human Rights Act 1998. The Conservative manifesto will propose that exclusive zero hours contracts be scrapped. Provisions in a Modern Slavery Bill will be designed to tackle the issue of modern slavery and to prevent the trafficking of workers.

The *Liberal Democrats*, at their conference in October, stated that they would propose an increase in the National Minimum Wage for first year apprentices by at least £1 per hour. Plans for a 'one stop shop' for workers' rights enforcement were announced. A new Workers' Rights Agency would streamline the work of the national minimum wage enforcement section at HM Revenue and

Customs, the Working Time Directive section at the Health and Safety Executive, the Employment Agency Standards inspectorate, and the Gangmasters Licensing Authority. In order to reduce discrimination in the recruitment process a 'name-blank' application form for the public sector was proposed.

In a proposal which would affect all civil court actions, including those in the employment tribunal, the Justice Minister stated that Government measures to assist the increasing numbers of litigants in person were to be announced before Christmas.

3: ACAS publish Shared Parental Leave good practice guide

ACAS has recently published "Shared Parental Leave: a good practice guide for employers and employees".

The guide sets out the rights and duties involved in Shared Parental Leave (SPL) which entitles eligible parents of babies due, or children placed for adoption, on or after 5 April 2015 to share responsibility for caring for their child during the child's first year.

It sets out a four-step process for employees and employers and includes example scenarios.

The guide includes detail on:

- how SPL relates to maternity leave, adoption leave and paternity leave and pay
- the eligibility criteria for qualifying parents;
- notice requirements for employees;
- provision for continuous leave (which cannot be refused) and discontinuous leave (which may be refused);
- the default provisions which apply where a request for discontinuous leave is refused or not responded to;
- the right for employees to have Shared Parental Leave In Touch (SPLIT) days;
- rights applicable on returning to work (depending on the length of leave period taken); and
- protections afforded to employees against suffering detriments due to an SPL request or leave period.

ACAS recommends that employers:

- have early conversations with employees who might wish to exercise the right to SPL;
- make early preparations for leave periods;
- develop an SPL policy or procedure;
- inform staff of their rights;
- hold meetings to discuss arrangements for specific SPL periods and minute these carefully to record agreements and disagreements; and
- stay in contact with employees during the SPL period.

The guide is available ***here.***

4: National Minimum Wage: EAT determines "trainees" are not working under a contract of apprenticeship

In ***The Commissioners for HM Revenue and Customs v Jones and others (t/a Holmescales Riding Centre)***, the EAT considered whether livery stables trainees were apprentices for the purposes of the National Minimum Wage (NMW).

This case concerned workers at a livery stables (run by the Jones family) who were referred to in contractual documents as "trainees". Their duties included maintaining the yard, looking after horses and giving riding lessons. The trainees were paid by the Jones family and they received training in preparation for British Horse Society (BHS) examinations. The contract did not oblige the trainees to undertake any particular qualifications. The trainees lived in part of the Jones family's house but were not treated as part of the family. Under the contract, the Jones family could dismiss a trainee without notice for gross misconduct. The contract contained notice provisions and was not for a fixed term.

The employment tribunal found that the trainees did not come under the NMW exemption for workers whose duties relate to the family household and who are treated as a member of the family. It also determined that the trainees were working under contracts of apprenticeship. This was based on the facts that the trainees expected to be trained and they all gained at least one BHS qualification.

On appeal, the EAT overturned this decision, finding that the trainees were employed under contracts of service and were not apprentices. It reiterated previous case law on what constitutes a contract of apprenticeship as follows. The primary purpose of an apprenticeship is training. An apprentice cannot be dismissed for gross misconduct: termination of a contract of apprenticeship can only occur due to a serious breach of contract which means that it is no longer possible to teach the apprentice. (In practice, this means that an apprentice cannot be dismissed for some types of conduct which would ordinarily lead to summary dismissal.) An apprenticeship should have a definable end point (either a fixed end date, or an event such as gaining a prescribed qualification). The EAT also took into account the fact that neither the employer nor the trainees thought they had entered a contract of apprenticeship.

Employers should note that an apprenticeship is primarily concerned with training. Where training is merely incidental, where the term is of indeterminate duration and where dismissal for gross misconduct is provided for, the contract is likely to be determined to be a contract of service.

5: Can an employer be liable to an employee for breach of contract and/or negligence in initiating disciplinary proceedings without undertaking due enquiry?

Not on the facts of ***Coventry University v Mian*** said the Court of Appeal.

In this case Dr Mian was a senior lecturer employed by Coventry University. She was alleged to have written a reference about Dr Javed, her former colleague, for the benefit of Greenwich University. The reference was misleading and inaccurate and overstated the colleague's qualities and qualifications.

Dr Mian denied sending the reference in question. But a search of her computer showed drafts

which were very similar. Dr Mian's case was that she was guilty of stupidity and naivety but not complicity. Dr Javed had sent Dr Mian draft references (containing the misleading information), which she had saved into her "H" drive. She had sent a shorter reference, she said, but had not saved it.

Soon after Dr Mian submitted a sickness certificate and the disciplinary hearing went ahead in her absence. At the end of the day the University dismissed the allegations against Dr Mian. Dr Mian did not return to work and she brought proceedings alleging breach of contract and/or negligence. The trial Judge held in her favour.

In the Court of Appeal it was held that the Judge had identified the correct test to apply the decision whether to commence disciplinary proceedings. This was whether the decision was "unreasonable" in the sense that it was outside the range of reasonable decisions open to an employer in the circumstances. This required an objective assessment and one that was not to be made with the benefit of hindsight.

Here the Judge was misled in eliding the question of whether it was reasonable of the University to institute disciplinary proceedings and whether, in the end, the allegations made against Dr Mian were true. The decision of the trial Judge was reversed and the University was not in breach of its duty of care.

6: TUPE and the business unlawfully carried on

In order for there to be a TUPE transfer does the business concerned have to be a lawful business?

The principle was set out by Elias J (as he then was) in *Rose & Hymes Plc v Duke* (EAT, 10th December 2012) as follows:

> "The undertaking that is to be transferred ought itself to be a legal one in the sense that if the undertaking itself is for an unlawful purpose as such - a man, for example, involved in money laundering or improper drug dealing or something of that nature - then the terms of the regulations, namely TUPE, would not be applicable. In other words, "undertaking" within the terms of regulation 3 means a lawful undertaking. But the regulations do not require that all the activities of the undertaking being transferred must be entirely lawful".

This proposition was tested in the case of ***Ejiofor t/a Mitchell & Co Solicitors v Sullivan.***

There was a small solicitors firm called Aaronson & Co practising on Kensington High Street. There had been periods when the business was not lawfully carried on because the solicitor in charge had been struck off. But the firm did not cease trading, whatever the legalities and formalities of the situation may have been. Client files continued to be serviced, bills were paid and monies received by the firm on the firm's account. The bank was not told that trading had ceased and the accounts continued to operate whenever funds were sufficient. Also there were some oversight arrangements in place with a succession of other firms over the period in question, albeit there might have been some gaps and/or failed arrangements during the period. The staff continued to work in the firm and were paid either by the firm or by another firm on its behalf. Then the practice was transferred to the appellant. The appellant claimed that TUPE did not apply because the business had been carried out unlawfully.

The employment tribunal held that TUPE did apply. Even if the firm had been operating "illegally" at times, in the sense of operating outside the Law Society regulations, this did not prevent it

from being an employer for the purposes of employment legislation. As the tribunal put it, employees did not automatically lose their status and protection as employees just because their employers were (without their own knowledge or connivance) operating illegally. The tribunal concluded there was an organised grouping of resources with staff allocated to structured tasks and this amounted to an economic entity which was transferred to the appellant.

The EAT agreed. It was not clear to the EAT whether there was any unlawfulness still in operation at the point of transfer. Nor was it entirely clear on the facts when and to what extent the business was operating outside the requirements for legal services before that. After the transfer the business was carried on entirely lawfully. According to the EAT the practice was not unlawful per se. It was perfectly lawful to provide legal advice. It might be that the way that it was done, or the lack of certain qualifications, would make some activities carried on by some people unlawful from time to time, but the business was not, as such, carried on for an unlawful purpose and therefore it fell under the proviso to Elias J's dictum in Rose & Hymes. In summary the EAT regarded the appellant's points as "hopeless". There was a TUPE transfer.

7: TUPE: Service Provision Change and assignment to an organised grouping of employees

In ***ALHCO Group Limited v (1) Griffin and (2) MJT Mechanical Services Limited*** the EAT considered the requirement, under regulation 3(a)(i) of TUPE (service provision change) that, prior to the service provision change, there must have been an organised grouping of employees and, in order to transfer, employees must be assigned to that grouping. This fact-finding exercise requires rigour.

Taunton Deane Borough Council was responsible for 6,000 council houses. It had, for 14 years, contracted out gas installations and repairs to MJT Mechanical Services Limited. In the autumn of 2011 the contract was retendered. MJT were not the successful bidders. The contract was now let to ALHCO Group, to start in April 2012. ALHCO accepted that some of the staff who had worked for MJT had transferred over so as to become its employees but not in relation to some 8 former MJT employees.

The employment tribunal found that the activities carried on by ALHCO were fundamentally or essentially the same as those previously carried out by MJT and that there was therefore a service provision change. Applying the EAT decision of *Lorne Stewart Plc v Hyde* (UKEAT/0408/12/GE), irrespective of the contractual documentation used by the parties the judge was entitled to look at what happened "on the ground" to test whether there had been a change to what would be expected of a new contractor. He found as a fact that the work had not changed.

The employment judge then considered whether within MJT there had been an organised grouping of employees assigned to carried out the activities on behalf of the Council that subsequently became the subject matter of ALHCO's contract. He considered that the employees concerned had then spent the 'majority' of their time on work for the Council. He therefore considered that there was an organised grouping of employees and the employees concerned were assigned to it.

On appeal the EAT agreed with the employer that the employment judge had paid insufficient attention to the rigorous requirement to identify the extent of the organised grouping (as laid down by *Eddie Stobart Limited v Moreman* [2012] IRLR 356) and had failed to indicate how the relevant grouping was organised, or how it came to be described as an organised grouping. The judge also failed to address how, and in what sense, he satisfied himself that each of the 8 particular claimants had been assigned to that organised grouping. Simply concluding that the individuals spent the "majority" of their time on the work concerned was insufficient. As the EAT said:

"It is our assessment that this is a plain case in which the employment Judge has failed to adequately explain the reasons for his decision. He does not identify the parameters of the organised grouping. Was it all the previous MJT staff or just some of them? If some of them, which of them, and how defined? He does not explain how any such group was organised or became separately identifiable. He says nothing at all about how it is demonstrated that any of these 8 particular claimants were assigned to whatever grouping there was."

The case was remitted for reconsideration of the "organised grouping" and assignment question to the same employment judge.

8: Collective Agreements and the Acquired Rights Directive

In our July 2014 Employment Law Bulletin we reported on the reference to the European Court made in ***Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich - Fachverband der Autobus-, Luftfahrt- und Schifffahrtsunternehmungen*** (case C-328/13). The issue for the European Court arose from the restructuring of Austrian Airlines under the domestic Austrian law on transfer of undertakings. It concerned an action brought by the Austrian Trade Union Confederation about the application of terminated but still applicable collective agreements following the transfer of an undertaking.

The Austrian Chamber of Commerce (bus, air and boat transport sector) was authorised to represent its employer members for the purposes of entering into collective agreements. The Chamber of Commerce concluded, for Austrian Airlines, a collective agreement applicable to all airlines in that group. The Austrian Confederation of Trade Unions and the Chamber of Commerce also concluded a specific collective agreement for a subsidiary of that group. In order to make good operating losses the parent company decided to transfer its aviation activity to the subsidiary so that employees carrying out that activity would be subject to the conditions laid down in the subsidiary's collective agreement, which were less advantageous than those of the parent company's collective agreement. The Chamber of Commerce rescinded the parent company's collective agreement. The Trade Union Confederation then rescinded the subsidiary's collective agreement on the same date. Following those rescissions the new employer of the employees concerned, i.e. the subsidiary, applied internal rules adopted unilaterally by it which gave rise to a consequent deterioration in the conditions of employment and a significant reduction in the remuneration of the employees concerned. The Trade Union Confederation's submission was that, as the subsidiary was no longer subject to any collective agreement in force, the benefits under the parent company's collective agreement, which had been rescinded, continued to apply to all the employees who had been transferred. Austrian law (the Arbeitsvertragsrechts Anpassungsgesetz) was amenable to this interpretation.

The Advocate General had (see our July Employment Law Bulletin) concluded that national law can permit continuance of terms under a terminated collective agreement until they are replaced by a new collective agreement or by an individually negotiated agreement.

The European Court has now agreed. The Acquired Rights Directive can be construed as meaning that terms and conditions laid down in a collective agreement may continue, if national law permits it, to have effect so long as the employment relationship is not subject to a new collective agreement or a new individual agreement concluded directly with the employees concerned.

In the UK, terms derived from a collective agreement which have found their way into the individual employment contract are not affected by the termination of a collective agreement. Once incorporated into the individual contract they continue notwithstanding the employer's abrogation of the collective agreement (see *Robertson and Jackson v British Gas Corpn* (1983) ICR 351).

Under the TUPE regulations as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014, in relation to transfers that take place on or after 31st January 2014 an employer may negotiate a variation of terms derived from collective agreements after one year following the transfer provided that the new terms agreed in replacement are no less favourable to the employees.

9: Government issues new guidance on employers' "Bring Your Own Device" (BYOD) policies

The Government has published a number of guidance notes on the risks for employers who allow employees to use their own devices to access business information and on ways of safeguarding against such risks.

The guidance, which is available ***here***, urges employers to consider a number of issues before taking a BYOD approach:

- Under data protection legislation, the employer remains responsible for protecting personal information (as data controller) even where the device used belongs to an employee. Data controllers can face fines of up to £500,000 for serious data breaches.
- Employers should check any contracts they have entered into as these may be affected by the implementation of BYOD practices.
- Employers should ensure they have an effective BYOD policy and design their networks so that access to information is effectively controlled and sensitive information protected. The guidance suggests that the agreement of staff members be sought before implementation and that they are asked to sign the BYOD policy.
- The guidance warns against making policies and network architecture too restrictive. Employees may be more likely in such circumstances to find workarounds which will compromise data security.
- The ease of connectivity and data sharing via personal devices should be taken into account by employers.
- Employers should ensure that business data is removed from personal devices when an employee leaves the organisation.
- It is important that employers plan for security incidents, ensuring that it is possible to act quickly to revoke access to business information when a personal device is stolen.
- To enable employers to exercise greater control over data, the guidance suggests that they might consider allowing employees to choose from a range of devices which are purchased and controlled by the organisation. Alternatively, employees may be permitted to use employer-owned devices for limited personal use.

10: Client Briefing: "Some other substantial reason" dismissals

This client briefing just provides an overview of the law in this area. You should talk to a lawyer for a complete understanding of how it may affect your particular circumstances.

In this briefing we highlight some common examples of "some other substantial reason" (SOSR) in the context of dismissing an employee.

Potentially fair reasons for dismissing an employee

There are five potentially fair reasons for dismissing an employee:

- Conduct
- Capability
- Redundancy
- Redundancy
- Breach of a statutory restriction
- Some other substantial reason (SOSR)
- What is some other substantial reason?

Almost any reason that does not fall within the other four potentially fair reasons for dismissal may amount to SOSR, if it is not an insignificant or frivolous reason that justifies the dismissal of an employee carrying out a particular role. This client briefing highlights some common examples of SOSR when dismissing an employee.

Business reorganisation

If the organisation is undergoing a restructuring, but is not making any redundancies, SOSR may be relied on as a potentially fair reason for dismissal. Business reorganisations often include making changes to employees' terms and conditions. Dismissing an employee for their refusal to accept the proposed changes (either within the context of a business reorganisation or not) can also amount to SOSR.

Refusal to accept changes to terms and conditions

An employment contract can only be varied in accordance with its terms or with the parties' agreement. If an employee refuses to accept a change to the terms and conditions and the organisation dismisses them for that reason, the reason may constitute SOSR.

However, these cases are unlikely to be straightforward because an employee is contractually entitled to resist unilateral changes to terms and conditions. In some instances where the change amounts to a breach of contract the employee may be able to resign and claim unfair constructive dismissal.

For a unilateral change to amount to SOSR the organisation must be able to demonstrate that the changes were not imposed arbitrarily but were for a "sound business reason". There is no need to prove that the reorganisation was crucial to the survival of the business. However, the business must provide evidence to demonstrate its reasons for the change and show they were not trivial.

Where the overwhelming majority of employees accept the change, or their unions have been involved and have accepted the changes, individual employees may struggle to show that their dismissal for refusing to accept the change was unfair.

Conflicts of interest

The organisation may be able to dismiss an employee for SOSR if the employee is in a situation that creates a potential conflict with the organisation's interests.

The organisation must be able to provide evidence that the employee posed a risk to its interests. The organisation will need to show that:

- The employee had access to commercial information;
- The employee had close connections with a competitor (or an employee of a competitor); and
- There was a genuine fear that the employee may leak confidential information.

To rely on SOSR, the organisation must be able to show that continuing to employ the employee would create a real commercial risk.

Personality clashes

Personality clashes or irreconcilable differences between colleagues can amount to SOSR. However, to do so, the conflict would have to be causing substantial disruption to the organisation. An employment tribunal will expect an organisation to take reasonable steps to solve the problem without resorting to dismissal for example by:

- Redeploying one of the workers
- Changing work patterns
- Attempting to mediate

Pressure from third parties

Where a third party (for example, a customer or supplier) requires an employee's dismissal the dismissal may be potentially fair for SOSR.

However the business should consider the:

- Importance of the third party's business to its own business; and
- The seriousness of the third party's threat to leave.

If for example a major client is adamant that it will never contract with the organisation again unless the organisation dismisses an employee, this is more likely to be regarded as fair than where a minor client simply requests the removal of an employee but does not threaten cessation of business.

Breakdown in trust and confidence

Organisations sometimes maintain that they must dismiss an employee because of a breakdown of trust and confidence. In some cases SOSR can be relied on in these circumstances as a potentially fair reason for dismissal. But extreme caution must be exercised here and legal advice taken. The tribunals do not like employers taking a shortcut to the exercise of finding a fair reason for dismissal simply by the mere assertion that trust and confidence has broken down.

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