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Employment Law BULLETIN

Welcome to our July employment law bulletin.

This month we cover cases from the employment tribunal, the EAT, the Court of Appeal and the European Court.

In *Family Mosaic Housing Association v Badmos* the EAT discusses the employer's discretion to choose the appropriate pool for selection for redundancy. In *Chindove v William Morrisons Supermarket plc* an employee was not prevented from resigning and claiming constructive dismissal notwithstanding a considerable delay between the breach of contract complained of and the resignation. This was due to a combination of the employer's delay in dealing with a grievance and an employee's period of sickness.

The long-running litigation in *Seldon v Clarkson Wright & Jakes* about a mandatory retirement age of 65 in a law firm partnership which was enforced in 2006, reached a further stage. As is known, the Supreme Court had held that the firm had legitimate aims for imposing the retirement age. The EAT has confirmed that the firm exercised proportionate means to achieve this.

A litigant in *Agbenowossi-Koffi v Donvand Ltd t/a Gullivers Travel Associates*, who made a second employment tribunal application covering incidents that could have been complained of in a previous employment tribunal application, was barred from proceeding on the ground that presenting issues in new proceedings which could have, or should have, been brought in earlier litigation was an abuse of process.

In TUPE transfers a transferor must give to the transferee employee liability information not later than 28 days before the transfer. If there is a breach of this obligation the transferee employer may sue the transferor employer. *Paul v PFGPS Limited* is a rare example of a case where an employer succeeded in recovering a financial remedy from a transferor for failing accurately to supply employee liability information.

In the European Court the Advocate General has issued his opinion on the effect of collective agreements which have been terminated following a transfer of an undertaking in *Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich - Fachverband der Autobus, Luftfahrt und Schifffahrtsunternehmungen*. Finally, the Information Commissioner's Office has issued valuable guidance on disclosure of employee information in relation to TUPE transfers.

Our client briefing this month is on the subject of managing poor performance.

May I also 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

The Diverse Organisation
- HR Workshop, 2nd September 2014

and in conjunction with ACAS in the North East:

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

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1. Unfair dismissal: The employer's discretion to choose the pool for redundancy

In ***Family Mosaic Housing Association v Badmos***, the EAT determined that the employment tribunal had been incorrect to criticise an employer for its method of identifying the pool from which employees were to be chosen for redundancy.

The case involved Mr Badmos, a regional delivery manager for a housing association. Family Mosaic employed five regional managers, three of whom were "new business managers" and two of whom were "delivery managers". The employer had decided that one of the new business manager roles was redundant. Initially, the employer determined that the pool for selection would include all five managers, as their skills were interchangeable. On reflection, the employer decided to ask each manager to state which role of the two they would prefer. The pool was then reduced to the three managers who stated a preference for the delivery manager role (this included the two delivery managers and one of the new business managers). Mr Badmos came within this reduced pool and, following an interview process, he was selected for redundancy.

At the initial hearing, the tribunal decided that Mr Badmos' dismissal was unfair, stating that no reasonable employer would have moved from a pool of all five managers to a pool of three managers who expressed a preference for the non-redundant role. It also found the selection of Mr Badmos, a black Nigerian man, to have been discriminatory on the ground of race.

Family Mosaic appealed on the ground that the tribunal had made the decision based on its own view of how an employer should behave, rather than considering the range of responses available to a reasonable employer.

On appeal, the EAT upheld the finding that the dismissal was unfair and tainted by race discrimination. It also agreed that the process was inconsistent between candidates and that changes to the planned process had been unexplained. However, it reiterated earlier EAT cases which made it clear that the employer has wide discretion in its method of choosing the pool for redundancy. These cases also clarified that there is no legal requirement for a pool to be limited to employees doing the same or similar work. Where an employer has genuinely applied his mind to the problem, it will be difficult (though not impossible) for an employee to challenge the way in which the pool was selected.

But notwithstanding that the employment tribunal had wrongly tackled the issue of the correct pool for selection of redundancy (by substituting its own view for that of the employer) there were sufficient deficiencies in the case for the finding of unfair dismissal and race discrimination to stand. This was because Family Mosaic could not explain why it had departed from its own model answers, why Mr Badmos had received certain negative comments in respect of his interview, and because Family Mosaic had decided not to take into account an assessment process or to proceed with the psychometric testing it had indicated to employees that it would follow.

2: Delay before resigning may not always be fatal to a claim for constructive unfair dismissal

In ***Chindove v William Morrisons Supermarket plc*** the EAT determined that, in a claim for

constructive unfair dismissal, an employee who was on sick leave in the period before resignation should not be deemed to have affirmed the contract by waiting six weeks to resign.

Constructive unfair dismissal occurs when an employee resigns in response to the employer's repudiatory breach of contract. If the employee continues to work after the employer's breach, he or she may be judged to have affirmed the contract and so will not be able to claim to have been dismissed.

Despite the fact that a period of more than four weeks is commonly viewed to be too long, there is in fact no set period of delay which will automatically preclude an employee from claiming constructive unfair dismissal. In this case, the EAT stated that the true test is not the amount of time which passed between the breach and the resignation, but whether the employee, by his or her conduct, affirmed the contract after the employer's breach.

The case concerned Mr Chindove, an employee of Morrisons. Mr Chindove experienced racial harassment and discrimination by another employee on two occasions. After the first of these, he complained to the general manager, who did not properly investigate the matter. After the second incident, Mr Chindove made a written complaint to the operations manager. This complaint was properly handled but Mr Chindove subsequently progressed his grievance to the Company's head office. The human resources manager at head office sent a report of her findings to the complainant over five months after the grievance had been referred to her. The tribunal subsequently found that she had actually done nothing to investigate the complaint. Mr Chindove then raised a "special complaint" at head office, but resigned a week after receiving a letter inviting him to discuss the matter. Mr Chindove was on sick leave for a period of six weeks before his resignation.

At first instance, the tribunal found that the date of the last breach of contract by the employer was the date on which the human resources manager's report was sent to Mr Chindove (representing the end of the five month delay in dealing with the matter). It also found that the length of time between sending that report and the date of the resignation (six weeks) was too long to conclude that the resignation was in response to the breach.

On appeal, it was determined that this period of six weeks did not necessarily imply that the employee had affirmed the contract. The EAT clarified that delay alone is not sufficient to defeat a claim for constructive unfair dismissal and took the view that, where an employee is on sick leave before resignation, conduct affirming the contract will be harder to infer.

Employers facing claims for constructive unfair dismissal should be aware that the tribunal will consider the circumstances of the claimant when determining whether a delay before resigning has defeated the claim. As well as the sick leave of the claimant, factors such as the claimant's financial position and responsibilities for dependants may be taken into account.

3: Mandatory retirement of partner at 65 considered to be objectively justifiable

Seldon v Clarkson Wright & Jakes, a long-running case concerning age discrimination, has finally been determined after a journey from employment tribunal to EAT, to the Supreme Court, back to employment tribunal and finally to the EAT.

The Employment Equality (Age) Regulations 2006 (the Age Regulations) were designed to implement the age discrimination aspects of the Equal Treatment Framework Directive 2001/78/EC. The Age Regulations allowed employers compulsorily to retire employees at the

default retirement age (DRA) of 65 or over. This was repealed in April 2011 following the Equality Act 2010. Now, compulsory retirement of any employee will be direct age discrimination unless it is objectively justified. This means objective justification by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives provided that the means of achieving those legitimate aims are appropriate and necessary.

But the DRA exemption in the Age Regulations never applied to partners. Enforcing a partnership retirement age even prior to 2010 therefore required objective justification.

In this case Mr Seldon was a partner in a law firm which imposed a mandatory retirement age of 65 for partners. In 2006 Mr Seldon reached 65 and was retired. He wished to continue to work for the firm in a self-employed capacity but the firm did not agree to this. He then brought a claim for direct discrimination on the ground of age.

The Supreme Court ruled that the imposition of a mandatory retirement age by the firm had legitimate aims.

These were:

- Retaining associates by being able to offer them the opportunity of partnership after a reasonable period.
- Facilitating partnership and workforce planning with realistic expectations as to when vacancies would arise.
- Contributing to a congenial and supportive workplace culture by limiting expulsion of partners through performance management

The Supreme Court upheld these legitimate aims but remitted the case back to the employment tribunal to consider whether the firm's retirement age of 65 was a proportionate means of achieving those legitimate aims. The employment tribunal agreed with the firm that retirement at that age was a proportionate means of achieving the legitimate aims that had been identified. Mr Seldon then appealed to the EAT for a second time. The EAT upheld the tribunal's decision. The firm had used proportionate means to achieve its legitimate aims. The tribunal had been correct to conclude that 65 was an appropriate retirement age. The fact that it might have identified a different age, slightly later, but very much within the same range, did not mean that it had made an error of law.

This case does not create a precedent. 65 was identified as the appropriate retirement age in the light of the fact that, at the time, the DRA of 65 was in place for employees. Things have moved on since then. Whether a retirement age can be objectively justified will always depend on the identification of legitimate aims which are pursued by proportionate means in the particular case in hand.

4: Race discrimination claim in second ET1 ruled an abuse of process

In ***Agbenowossi-Koffi v Donvand Ltd t/a Gullivers Travel Associates*** the Court of Appeal upheld the findings of an employment tribunal and EAT that amendments to a claim for direct race discrimination in a second ET1 (employment tribunal claim form) should be struck out as an abuse of process.

The claimant, Ms Agbenowossi-Koffi, alleged that in November 2009 her supervisor had called her a "monkey" within her hearing (the initial incident). The claimant did not file her ET1, however, until June 2011. As the ET1 should be filed within three months of the last incident of

discrimination, the claim was significantly out of time. Before the employment judge could decide whether it was just and equitable to extend the time for submitting the claim, the claimant applied to amend the ET1. She wished to add two further incidents: the fact that her employer told her she had to continue to work with the same supervisor; and her employer's failure to implement the cultural awareness training recommended after the initial grievance. As these issues were still ongoing, the amended ET1 would then not be out of time. The judge refused the application to amend the ET1 and did not consider it just and equitable to extend time for the original claim.

The claimant then submitted a second ET1 which included the initial incident and the two further incidents. The employment tribunal ruled that the claim should not proceed for two reasons. First, Ms Agbenowossi-Koffi could not bring proceedings for the initial incident, as claimants are prevented from pursuing a cause of action more than once. Secondly, the further incidents should have been included in the original ET1. Under the 19th century case law rule in *Henderson v Henderson* (1843) 3 Hare 100, claimants are prevented from presenting issues in proceedings which could or should have been brought in earlier litigation. The judge stated that it would therefore be an abuse of process to allow issues which should have been raised in the first ET1 to be raised in subsequent proceedings.

On appeal to the EAT, this ruling was upheld. The EAT stated that the judge was correct to find that, if the claimant had genuinely believed them to be discriminatory, she would have included the further incidents in her first ET1 and that their inclusion was simply a way to extend time for the claim.

The claimant appealed to the Court of Appeal. Again, the judge's ruling was upheld. It noted that abuse of process will only be found where subsequent proceedings involve "unjust harassment". The Court of Appeal, however, clarified that bringing two sets of proceedings where only one should have been brought is sufficiently oppressive to constitute an abuse of process.

5: An employment tribunal decision on an award for compensation for failure by a transferor to provide employee liability information

Under regulation 11 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 a transferor employer is obliged to give employee liability information no later than 28 days before a relevant transfer. If there is a failure to do so, or if the information is inaccurate, the employment tribunal can, under Regulation 12, award compensation to the transferee which is just and equitable, subject to a minimum award of £500 per employee. Cases are rare, if not virtually unheard of. However, the employment tribunal case of Paul v (1) PFGPS Limited t/a Clapham SPMS (2) Streatham Neighbourhood Talking Therapies Limited (case number 2300375/2013) provides an example.

The claimants in this case were employed respectively by Clapham and Streatham, which organisations provided counselling services to a client, Lambert Primary Care Trust. Both Clapham and Streatham employed counsellors. The claimants in this case were previously categorised as self-employed. The PCT decided to reconfigure services into a single, combined, contract, which was won by Awareness.

Employee liability information was provided to Awareness by Clapham and Streatham but the claimants were not designated as employees who would transfer under TUPE. Their contracts were terminated prior to the transfer to Awareness. The claimants then challenged their employment status before an employment tribunal and successfully argued they were in fact

employed. They went on to claim unfair dismissal and succeeded in this regard. Liability for the unfair dismissal claims passed to Awareness under TUPE (this was not disputed) and since there had been no information to and consultation with appropriate employee representatives, protective awards under Regulation 15 were made for which Awareness, as transferee, was jointly and severally liable. Awareness sought to recover various sums from Clapham and Streatham (although by the time of the proceedings Streatham had become insolvent and was removed from the proceedings). It relied on breach of Regulation 11 and claimed remedies under Regulation 12. These were, first, an indemnity in respect of the unfair dismissal awards that it had inherited, secondly, an indemnity in respect of the joint and several liability to pay compensation for failure to inform and consult and, thirdly, its legal costs.

There was also an issue whether the claim under regulation 12 was out of time. A transferee has three months to bring a regulation 12 claim and Awareness were three weeks late in bringing the claim. On the latter point the employment tribunal held it had not been reasonably practicable for Awareness to have bought the claim in time as it only became aware that the claimants were challenging their employment status when employment tribunal claims were served. The regulation 12 claim could therefore proceed.

The employment tribunal then considered that it was just and equitable in the circumstances of the case to award compensation to be paid by Clapham to Awareness in a sum equivalent to the Clapham claimants' unfair dismissal awards. This was a loss suffered by Awareness which was attributable to Clapham's failure to notify the transferee of employee liability information in respect of the Clapham claimants. If it had known that the claimants were employees it would not have dismissed them, but employed them, and would have recovered the costs of employment through its tender bid.

However, the employment tribunal ruled that Awareness could not claim an indemnity in respect of its joint and several liability for the protective award made under regulation 15. It held that an indemnity for the protective award was not loss of the kind envisaged when regulation 12 was drafted. Nor could Awareness claim under regulation 12 for its legal costs. The Employment Tribunal Rules of Procedure set out an exclusive set of rules strictly regulating the circumstances in which costs can be awarded. If costs were to be awarded as a loss under regulation 12 that would circumvent the rules. According to the tribunal, that could not have been the intention of Parliament when enacting regulation 12.

6: ICO guidance on disclosure of employee information under TUPE

The Information Commissioner's Office has just published a ***Guidance Note*** on disclosure of employee information under TUPE to ensure compliance with the Data Protection Act 1998 in business transfers.

As is known, a transferor must, under the provisions of the TUPE regulations themselves, supply employee liability information no later than 28 days before the transfer. But additionally, a transferee may require much more information before proceeding with a purchase or a transfer and the Information Commissioner's Office has now produced guidance for those involved in TUPE transfers.

The guidance commences with reiterating the 8 principles of good information handling. The main provisions of the Data Protection Act are to be found the ***ICO Guide to Data Protection***. The guidance then seeks to explain what organisations need to do to comply with the Data Protection Act when providing information about their employees under TUPE.

The guide reiterates the information to be given by a transferor to a transferee no later than 28 days before a transfer under the TUPE employee liability information rules. This includes the identity and the age of the employees concerned. But this kind of disclosure, although ordinarily sensitive, is allowed, because the Data Protection Act 1998 allows any disclosure that is required by law.

In relation to any additional disclosure, however, an employer should exercise caution. For example, the employer should release information that is anonymised or, at the very least, should remove obvious identifiers such as name. It should only disclose that kind of information with the consent of the individuals concerned or put in place appropriate safeguards to ensure that the information will only be used in connection with the proposed business transfer and will not be kept once it has been used for this purpose.

We are reminded that the ICO has also published an ***Employment Practices Code*** which provides useful guidance in relation to requests for information about employee records. The Guidance itself also deals with the question of employment records after the transfer. Its view is that the former employer would not need its employees' consent to the transfer of their personal information after the business transfer if it was necessary for the purpose of the transfer and the business needs of both parties. But the new employer should consider whether all the information in personnel files handed over is needed and delete or destroy any unnecessary information.

The question also arises whether the former employer can keep personal information after a transfer. The former employer normally has to keep some personal information about former employees, for example to deal with residual liabilities. The Data Protection Act permits this as long as the former employer has a justifiable need to keep the information and only keeps it for as long as necessary. The former employer should delete or destroy securely any information they do not need to keep.

The Guidance concludes with a good practice tips in respect of the transfer of information to a prospective transferee in relation to a TUPE transfer.

7: Collective Agreements and transfer of undertakings: Reference to the European Court

The Austrian Supreme Court (Oberster Gerichtshof) referred a reference to the European Court in June of last year concerning the effect on employees' terms and conditions when a collective agreement is terminated following the transfer of an undertaking.

In ***Österreichischer Gewerkschaftsbund v Wirtschaftskammer Österreich – Fachverband der Autobus, Luftfahrt und Schifffahrtsunternehmungen*** the issue concerned the restructuring of Austrian airlines and domestic Austrian law on transfer of undertakings. It concerned an action bought by the Austrian trade union confederation about the application of terminated but still applicable collective agreements following the transfer of an undertaking. In this case the collective agreement was terminated and the question was whether the terminated collective agreement had an 'after-effect' i.e. whether the workers concerned continued to be covered by the old collective agreement until a new collective agreement was put in place, notwithstanding the termination of the original collective agreement.

The European Court was asked to consider the following questions:

1. "Is the wording of article 3(3) of [the Acquired Rights Directive], according to which the "terms and conditions" agreed in any collective agreement and applicable to the transferor must continue to be observed "on the same terms" until the "date of termination of expiry of the collective agreement", to be interpreted as also covering terms and conditions laid down by a collective agreement which have continuing effect indefinitely under national law, despite the termination of the collective agreement, until another collective agreement takes effect or the employees concerned have concluded new individual agreements?"

2. "Is article 3(3) of [the Acquired Rights Directive] to be interpreted to the effect that "application of another collective agreement" of the transferee is to be understood as including the continuing effect of the likewise terminated collective agreement of the transferee in the above mentioned sense."

The case will be heard by the European Court probably sometime later this year. The Advocate General has given an opinion. No English translation is available but the gist of his opinion is that national law may permit continuance of terms of the terminated collective agreement until they are replaced by a new collective agreement or by an individually negotiated contract.

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 the collective agreement. Once incorporated into the employment contract they continue notwithstanding the employer's abrogation of the collective agreement (*see Robertson and Jackson v British Gas Corporation* [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 employee 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.

8: Client Briefing: Managing poor performance

This client briefing highlights the key issues that an organisation should consider when dealing with poor performance. Failure to follow the correct procedures can have serious financial and commercial implications for organisations, including unlimited compensation in some extreme cases.

General Good Practice to help avoid potential claims

- Organisations should follow good management practices to help avoid potential claims relating to a dismissal.
- Make sure that any employee-related policies and procedures the organisation has are also followed (for example, an equal opportunities policy).
- Address any issues with employees as soon as they emerge. Generally an employer's position deteriorates the longer the delay.
- Think carefully before sending any emails to employees (for example, never send any aggressive emails as they could be used against the organisation by an employee in a future claim).

- In many circumstances an informal meeting with an employee can resolve a problem. However employees must be made aware that a formal process could be used if an issue remains unresolved. The procedure for formally disciplining an employee is complicated, so take legal advice before starting the process.
- Keep records of any emails, letters, conversations or meetings (formal or informal) that the organisation has with employees relating to their performance.
- Conduct regular appraisals with employees to enable the organisation to give an honest assessment of their performance and allow them to raise any concerns.
- Do not give flattering performance reviews if they are underserved. They could make it more difficult to dismiss an employee in the future.
- Use probationary periods effectively. If the organisation has any legitimate concerns about a new employee, it may be able to extend the period or dismiss them at the end of it. An organisation will have to provide at least one week's notice to dismiss (although it may be more, depending on what the contract says).
- Employees should not be side-lined, bullied or shunned in order to get them to leave. If an employee can demonstrate that they resigned because of the organisation's conduct, they could have a claim for constructive dismissal.
- Be very careful if stress may be a reason for an employee's poor performance (for example, they are struggling to cope with an increased or challenging workload). In these circumstances, take legal advice.
- Fully investigate any claims made by or against an employee before making any decision.
- Do not assume that the organisation can dismiss an employee simply because their fixed term contract is coming to an end. The employee may have a claim for unfair dismissal. Unfair dismissal is any dismissal that is not for a fair reason or does not follow the correct procedure.
- Always take any employee grievances or claims raised against the organisation seriously. Be particularly careful if an employee has raised a grievance or claim in the past. The organisation should make sure that any further allegations are dealt with fairly, to avoid the risk of them bringing a victimisation claim. Victimisation is a type of discrimination where someone treats another less favourably because they have made, or that person thinks they have made a discrimination claim or have given evidence in connection with a claim. Sometimes, from both a practical and commercial point of view, it is simplest to try and reach a financial agreement with an employee to leave the organisation. Take legal advice before entering into any kind of negotiation. If an agreement can be reached to protect the business the employee should be asked to sign a settlement agreement. A settlement agreement is an agreement, usually in return for a fixed sum of money, in which an employee specifies that they will not bring a claim against their employer.
- There is no obligation on an organisation to provide a reference if one is requested. However, if a reference (oral or written) is provided for an employee the organisation must ensure that it is accurate. For example, a good reference should not be given to an employee that the organisation has dismissed for poor performance as this could lead to a claim being brought.

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