



Employment Law Bulletin Issue 34

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Recent cases

No unfair dismissal when transferee changed terms post transfer.

The EAT has recently considered whether a transferee acted lawfully when changing employees terms following a TUPE transfer. The decision is generally welcoming for employers.

In *Enterprised Management Services Ltd v Dance & others* UKEAT/0200/11, EMS proposed new hours and performance related pay for all its staff (maintenance engineers). The reason was to try and secure ongoing work with one of their customers (Modern Housing Solutions (MHS)) who had said that on the expiration of their current contract, the services would be subject to a tender and the successful contractor would need to “provide the services at a reduced cost with improved service delivery, efficiency and productivity”.

EMS secured the new contract and a TUPE transfer took place where the employees of another service provider to MHS (Williams Engineers) transferred to EMS. Following this, EMS decided that in order to fulfil its productivity requirements to MHS, they would need to introduce performance related pay for the transferred employees too.

On the face of it, this appears to be an attempt at harmonising terms which is generally difficult to do following a transfer. The transferred employees from Williams Engineers did not agree to the new terms and were dismissed. They brought employment tribunal claims alleging automatic unfair dismissal on the basis that the reason for their dismissal was connected to the transfer.

At an employment tribunal, it was decided by a majority that the dismissals were connected with the transfer as the reason or principal reason for the change in terms was to achieve harmonisation of terms with the existing workforce.

However, on appeal, the Employment Appeal Tribunal (EAT) upheld the transferee’s appeal and gave a fairly broad judgment which focused on adopting a “looking back” exercise whereby the EAT decided that EMS’ actions were in fact connected to the decision they took before the transfer, when trying to appeal to MHS for the retendered services. Essentially, the EAT took the view that harmonisation of terms was not the principal reason for EMS’ decision to dismiss those who refused the new terms; it was in fact linked to the pre transfer decision to try and improve productivity and a desire to continue with this level of productivity.

This is certainly a bit of a stretch to the words “connected with the transfer” as the reason for the new terms was of course related to the retender that EMS applied for which subsequently led to the transfer when EMS won the contract. The EAT however preferred to look at a different timeline to the employment tribunal in order to conclude that it was perfectly lawful for an employer to introduce new terms, and then seek to harmonise those terms, when a transfer happens to take place after the drive to increase productivity.

This case follows a few others recently where it appears that employers are being afforded a certain amount of leeway to change terms of employment following a transfer. However, most of these are specific to the facts of the case and it remains the case that following the transfer, it will generally be difficult to harmonise terms, particularly if the reason is simply to have all staff on the same terms and the reason for wanting to achieve harmonisation is due to new employees having joined the payroll since the TUPE transfer. Overall, harmonisation of terms is still likely to be because of the TUPE transfer in those circumstances, or for a reason connected to the transfer, which does not amount to an ETO (economic, technical or organisational) reason entailing a change in the workforce. The risk of an automatic unfair dismissal claim in this situation is always worth bearing in mind, especially where high numbers of employees are involved, but this case and some other recent decisions, do indicate that tribunals will be willing to look in some detail at the reason behind wanting to change terms. If the cause can be established to be distinct from the transfer itself – such as to reflect standard practice rather than simply to harmonise terms with the existing workforce – it is more likely that any dismissals as a result of a refusal to agree to the changes will be fair.

If you require further advice on this area please contact Sukhpal Matharoo on 0118 951 6921 or at sukhpal.matharoo@blandy.co.uk

Does a commitment to wearing a poppy amount to a philosophical belief?

The answer is 'no' according to the recent case of *Lisk v Shield Guardian Co Ltd & others ET/3300873/11*. Here, Mr Lisk was not allowed to wear a poppy at work in November last year. Presumably this was made all the more poignant by the fact that he is an ex servicemen. It is unclear from the judgment as to why the request to wear the poppy was refused (the hearing was a pre hearing review only) but presumably it may have been linked to the employer's dress code policy.

Mr Lisk brought various claims against his employer, including that he had been subjected to discrimination because of his religion/belief when his employer did not allow him to wear a poppy at work. Mr Lisk argued that he regarded 2 – 11 November as a mourning period although also mentioned that the poppy can be worn all year on principle. He clearly considered the poppy as a mark of respect



for the sacrifice of lives lost at war and maintained that poppy wearing was widespread in the UK and did not conflict with any other rights.

While the tribunal sympathised with Mr Lisk's position, their focus was on whether the belief in wearing a poppy amounted to a "philosophical belief", affording it legal protection. In the last year or so, this belief has been held to extend to a belief in climate change, a belief against fox hunting and a belief in public service broadcasting.

However, here the Tribunal decided that the belief in wearing a poppy lacked the characteristics of "cogency, cohesion and importance" which were laid down in the *Grainger v Nicholson* case last year. The decision stated that while the belief was an admirable one, it could not be said that the belief in showing respect and support for the sacrifice of others amounted to a "substantial aspect of human life and behaviour". It is fair to say that the previous recent cases have held that the belief in question should generally correspond to a "way of life" or at least determines/guides how an individual lives their life.

There is obviously a very fine line to be drawn in deciding whether a belief amounts to a philosophical belief protected by discrimination laws; employers should be careful to consider matters involving individual beliefs seriously and to not make any pre determined assumptions. This case is also a first instance decision and could be appealed. However, at the moment it would seem that the employment tribunal is reigning in rather than expanding this area of protection.

If you require further advice on this area please contact Rebecca Hill on 0118 951 6833 or at rebecca.hill@blandy.co.uk

EU decision limits carry-over of holiday by sick workers

The Court of Justice of the European Union ("CJEU") in the case of *KHS AG v Wilfred Schulte* has held that national rules limiting carry-over holiday by workers on long-term sick leave to 15 months after the end of the relevant leave year are lawful under the Working Time Directive ("WTD").

As a result of a previous ruling in the case of *Stringer v HMRC*, it has been established that workers on long-term sick leave have the right to accumulate holiday during that period and, if necessary, carry it over to the next leave year. However the ruling in *Stringer* left unanswered a few questions, including whether carry-over must be allowed indefinitely in the case of a worker on long-term sick leave spanning several leave years.

The case of *KHS AG v Wilfred Schulte* was initially reported in our August bulletin and concerned the compatibility of the WTD and German national law which stated:

“If leave is carried over it must be authorised and taken during the first three months of the following calendar year...if leave could not be taken because of illness, entitlement to leave shall lapse 12 months after the end of the period of (3 months after the end of the calendar year).”

Mr Schulte, a former employee of KHS AG, requested an allowance in lieu of paid annual leave for the years 2006 to 2008 that he had not taken because he had suffered a heart attack. His entitlement to annual leave was 30 days per annum. In March 2009 he brought an action against KHS before the German Labour Court for payment in lieu of the paid annual leave he did not take in 2006, 2007 and 2008. The case progressed to the German High Labour Court which ruled that Mr Schulte was entitled to the paid annual leave for 2007 and 2008 but not for 2006 as the carry-over period permitted by German law had expired. This meant that Mr Schulte could only claim for leave not taken over a 15 month period.

The German Labour Court did not however exclude the possibility that the loss, under national rules, of the paid annual leave for 2006 is contrary to Article 7 of the WTD (which simply states that Member States must ensure every worker is entitled to paid annual leave of at least 4 weeks). It therefore applied to the CJEU for a ruling on the following questions:

- ✓ Does Article 7 of the WTD preclude national legislation and/or practices under which entitlement to annual leave lapses after the end of a leave year or a carry-over period, even where the worker has been on long-term sick leave to the extent that that he/she could otherwise have accumulated several years' worth of entitlements?
- ✓ If the answer to the above question is answered in the negative, must the possibility of carrying over leave entitlement exist for a period of at least 18 months?



On 7 July 2011 the Advocate General (whose role is to present impartial opinions to the CJEU before a case is heard) gave an opinion to the effect that workers on long-term sick leave should not be able to accumulate paid annual leave indefinitely and that a period of 18 months should serve as a guideline for member states when considering the period after which untaken leave is extinguished. Further details can be found in our August bulletin which discusses the opinion in full.

In its judgment the CJEU took a broader view than the Advocate General and essentially ruled that provisions about carry-over leave are a matter for individual member states. It also ruled that any carry-over period must ensure that a worker who is unfit for several consecutive reference periods is ensured of rest periods that may be staggered or planned in advance. Any carry over period must be “substantially longer than the reference period in respect of which it is granted” (in other words, where leave is allocated on a yearly basis as is generally the case, carry-over must be “substantially longer” than a year). However, the CJEU held that the carry-over period must also protect the employer from the risk that the worker will accumulate periods of absence of too great a length. If leave is carried over indefinitely, then there comes a time when it ceases to provide a rest from work and becomes “merely a period of relaxation and leisure” which is not consistent with the health and safety aim of Article 7 of the WTD. It was therefore held that a carry-over period of 15 months does not run contrary to Article 7. As a result of its answer to the first question posed by the German national court, the CJEU did not see the need to answer the second question.

The CJEU has generally followed the Advocate General’s opinion and this will undoubtedly serve as a welcome relief to employers who would have previously feared claims for holiday pay stretching over a number of years.

Nonetheless, the judgment leaves a degree of ambiguity for employers as the 15 month carry-over period seems to have been accepted by the CJEU without any real reasoning behind it. In May 2011, the UK government announced its intention to review the Working Time Regulations (which implemented the provisions of the WTD in the UK) in light of the judgment of *Stringer* and will now face difficulties as to whether to implement a 15 month carry-over period, or risk infraction proceedings by limiting the carry over period to between 12 and 15 months. In the meantime, employers should be wary of trying to limit the carry-over period to anything less than 15 months.

It is also slightly unclear how this decision sits with the recent domestic case law which has confirmed that workers still need to request leave in order to be entitled to paid annual leave at a later date. The recent EAT decision of *Fraser v South West London St. George's Mental Health Trust* stated that “it cannot be right for employees to receive holiday pay for leave which they have never taken” and accordingly held that employees on long-term sick leave were required to give notice to take holiday. The legal reasoning behind this was that Regulation 15 of the Working Time Regulations requires workers to give notice to their employer specifying the days on which they wish to take annual leave. The EAT in *Fraser* said that there was nothing to suggest that Regulation 15 did not apply to workers who were off sick and as Ms Fraser had not exercised her right to request and take annual leave she was not entitled to be paid for it.

However, the “theme” from the CJEU case appears to contrast with this by emphasising that the right to paid holiday should be not be constrained by imposing obstacles or conditions that are difficult to meet. Further case law will hopefully address this uncertainty!

If you require further advice on this area please contact Laura Binnie on 0118 951 6855 or at laura.binnie@blandy.co.uk

Equal pay claims can proceed in civil courts

Last week, the Court of Appeal made a rather enlightening judgment that civil courts, as well as employment tribunals, should have jurisdiction to hear claims under the Equal Pay Act 1970. One key effect of this is that the time limit for pursuing such claims would be six years in the courts, rather than six months in the tribunal, thereby enabling claimants to claim for far longer periods of time and in turn, an increased amount of “lost wages”.

In *Birmingham City Council v Abdulla*, 174 women who had worked for the Council in Birmingham brought claims alleging that they had not been paid equally in comparison with various predominantly male groups of staff, with regard to a bonus scheme applied by the Council. Albeit working in different roles (mainly catering and cleaning), they claimed that the status and grades of their jobs were comparable to certain males working in other areas within the Council. The Council argued that the female employees could not bring their claims on



the basis that they were time barred in the employment tribunal – having lodged their claims outside the six month time limit.

The Court of Appeal upheld a decision of the High Court and ruled that they would not exercise their discretion to strike out the claims and instead, would allow the claims to be presented in the civil court. The Court’s reasoning appears to be based on policy, having referred to the purpose of the discretion to strike out as being for the distribution of judicial businesses, rather than “stifling claims”.

Unlike the reasoning adopted by the High Court, the Court of Appeal did not seem to impose an obligation on the claimants to explain why they had not been able to bring their tribunal claims in time; on a fair construction of the Equal Pay Act 1970, it was held the jurisdiction should be extended to civil courts as it was wrong for the merits of the claims not to be considered. It therefore will not generally matter that claimants have missed the deadline for the employment tribunal (provided there is not an abuse of process).

While applicable to all, the decision is likely to have the most amount of relevance in the public sector. However, the potential financial implications will be significant – not only will claimants be able to receive back pay for up to six years, but the costs position in the civil courts means that if an employer loses the case, they will generally be liable to pay the claimant’s costs.

Permission to appeal to the Supreme Court has however been granted to the Council so the case will remain one to “keep an eye on”.

If you receive a claim that has been lodged in the High Court, you should seek legal advice without delay as the timescales for response are particularly stringent.

If you require further advice on this area please contact Shaun Hogan on 0118 951 6843 or at shaun.hogan@blandy.co.uk

Employment Law News

Government announces response to consultation on "Resolving Workplace Disputes"

As Following the consultation launched in January this year, entitled "Resolving Workplace Disputes", the Government has now published its response, setting out a wide range of finalised proposed reforms to the employment tribunal system, and employment law in general. One of the stated aims of the consultation was to "help businesses feel more confident about hiring people" and achieving an earlier resolution of disputes. One of the proposals – increasing the qualifying period of service for unfair dismissal claims from one to two years – has already been confirmed as coming into force in April 2012.

The key elements of the further proposed reform are:

Increased use of mediation

As a result of the response to the consultation paper, the government is keen to try and raise the awareness of mediation as an effective method of resolving workplace disputes. To this end they will therefore fund a mediation training scheme in order to create a network of mediators that could provide inexpensive mediation services to other organisations within the same network. It is also proposed that the retail sector will be the subject of a pilot scheme to test how retailers (who already have invested in some house mediation services) can share their mediation experiences with other smaller employers in their supply chain.

The response to the consultation highlighted particular areas that would be suited to mediation services as being discrimination, bullying, diversity issues and "fairness" issues. It was also highlighted that mediation would only be effective before any litigation was issued and even before the commencement of internal procedures such as disciplinary or grievance processes. It remains to be seen how this will work in practice as without internal procedures being initiated, the issues may not easily come to light as possibilities for mediation. The government's aim, however, is clearly on dealing with an early resolution to workplace issues before they become out of hand and certainly before they become too litigious. This should have the advantage of saving cost and also hopefully saving the employment relationship if the mediation is successful.



The funding scheme will be piloted at a regional level first so the full effect will not be known for some time. In the meantime, remember that ACAS does offer a mediation service which is encouraged, particularly for discrimination claims where it may be worthwhile for all parties to “sit down and talk around a table”. However, the reported use of ACAS’ mediation services is fairly low and it will be interesting to see how far the government’s new proposals will go to changing that trend.

Early conciliation of claims via ACAS

In a rather bold move, the government’s response to the consultation states that measures will be introduced where claimants will need to submit details of their claim to ACAS before submitting any tribunal claim. The idea is that there will then be an opportunity for the claim to be resolved in the meantime as “early conciliation” services will be offered to the parties. If this is not successful, or either party refuses to take part, then the tribunal claim will be able to proceed. Again, the aim is for the dispute to be resolved as early as possible, with Tribunal time and resources being avoided if possible.

However, the practicalities of this proposal are unclear. The time limits for lodging the claim will, it seems, be effectively extended (or rather, “the clock stopped”) as the pre claim conciliation will last for one month. After the completion of that early conciliation time, the claimant will then have one month to submit the tribunal claim. This seems to suggest that the time limit for lodging claims will in effect be extended, or have the clock stopped, by two months. In addition, there will apparently be a power given to ACAS to extend the pre claim conciliation time by two weeks if there is a reasonable prospect of coming to a settlement. In terms of the pre claim conciliation itself, ACAS will have a duty to conciliate. However, it does seem that participation in the process itself by the parties will not be compulsory.

This leaves open the question as to how ACAS will have the funding to deal with these new measures, particularly after the cuts that have already taken place. The government has reported that greater resources will be made available via savings made due to the expected reduction in the number of tribunal claims. However, it will of course remain to be seen whether the new proposals will in fact result in fewer claims reaching tribunal; the parties may simply not wish to engage in pre claim conciliation. That said, the option of resolving the dispute without the strict 28 day period in which to respond to an ET1 form kicking in may be attractive to employers, depending on the nature of the claim.

Compromise agreements

Part of the consultation sought views on the effectiveness of compromise agreements and any perceived problems. In response to the reported disadvantages (which included cost and complexity, together with a “claims culture”), the government has announced that it will consider how to draft a standard text and guidance for parties to use – this will presumably result in a shorter and more streamlined document; they will also review the available advice and guidance on compromise agreements and will change the name of compromise agreements to “settlement agreements”. Importantly, there will also be consultation on the rule that requires each potential statutory claim to be listed in order for the agreement to be valid – the consultation will focus on whether a general waiver of all “existing and future claims” can be introduced.

In addition, the government intends to consult on the ability for employers to have “protected conversations” with employees without the fear of the conversation resulting in a constructive unfair dismissal argument – see below for our commentary on this.

Fortunately, there is confirmation that the ambiguity surrounding section 147 of the Equality Act 2010 will be clarified “at the earliest opportunity” – which should remove the absurd risk that discrimination claims cannot be comprised.

No firm action has been announced in the government’s response to compromise agreements as yet and it will therefore be a case of watching this space in the future for any reform that takes place. The aim stated in the response is to make it easier for employers to settle claims with employees, which is to be welcomed, but the employee will still always need to obtain legal advice on the agreement so it is by no means certain that any changes to this area will be radical. A standardised, shorter document will however probably be positive for both parties, although it would seem that this could still be amended by agreement so is likely to become a starting point only.

Tribunal reform and modernisation

The government has proposed some various and far reaching measures for dealing with Tribunal claims once they are in the system. The key ones include that:



- ✓ Judges will be able to hear unfair dismissal claims sitting alone, rather than with two lay wing members. There was not a great deal of support for this within the response to the consultation, but the government has stated that the savings involved were “too great to ignore”. This raises questions of whether this will achieve the “fairest” outcome as lay members are generally well regarded for bringing their practical experience to the table in matters where issues of fact are often key to deciding the case.
- ✓ Deposit orders (for a claimant to pay to continue with their case) are to be increased from a limit of £500 up to £1,000, with the limit on Costs awards (legal fees which either party can be made to pay in respect of proceedings that have been conducted unreasonably etc.) increasing from £10,000 to £20,000.
- ✓ Witness statements in tribunal hearings will now be taken as read unless directed otherwise.
- ✓ The costs of witness attendance will be borne by the parties if directed by the Tribunal and state funding of expenses of witness expenses will be withdrawn.

Mr Justice Underhill has meanwhile been tasked with preparing a review paper entitled “Fundamental Review of Employment Tribunal Rules” where he will be considering further reform in some detail, including the proposal contained in the consultation for judges to no longer have a power to strike out cases during Case Management Discussions. We will keep you updated on those developments.

Figures for statutory redundancy payments and tribunal awards to be updated

Payment of statutory redundancy payments (including a week’s pay) and tribunal awards are currently rounded up the nearest £10, but this will change to be rounded up to the nearest £1. This is being introduced to address the risk that rounding up to the nearest £10 sometimes results in the increase being well above the RPI rate of inflation. Again, this is an employer friendly move and seems designed to ease employer frustration with tribunal rules.

Financial penalties for employers

These will be introduced, payable by an employer who loses a claim. The penalty will be half of the total award made by the tribunal, but will be a minimum of £100 and a maximum of £5,000. There will be a 50% reduction in the penalty if

the payment is made within 21 days and the levy of the financial penalty will be at the tribunal's discretion. However, this is clearly a radical approach which will burden employers with further costs in addition to the amount of compensation already paid to the successful claimant. Once again, the emphasis is on deterring parties from proceeding to a Tribunal hearing and sorting out disputes early on. How this will (or won't) work in practice will be the test going forward.

Rapid resolution scheme

Finally, the government is going to be consulting on a "Rapid Resolution" scheme with the aim of hearing straightforward claims (such as pay disputes) without a full hearing and launching a separate consultation on simplifying compromise agreements and exploring "protected conversations" (see below).

Government issues Consultation on "Protected Conversations"

Last month, and as referred to in the consultation response above, the Coalition Government made another "pro employer" announcement to state that a consultation will be issued shortly on "protected conversations" in the workplace. The idea seems to be to allow employers and employees to have "frank" discussions about matters such as performance or general ongoing employment issues, without the employer having a "fear" of the words being used against them in a constructive unfair dismissal argument.

It appears to be a widening of the Without Prejudice rule which currently allows employers to have an off the record discussion with an employee, provided they prefix the discussion with the label "Without Prejudice" and also, provided there is a genuine dispute between the parties that can warrant a settlement discussion.

On the face of it, this would certainly make it easier for employers to sit down and have informal, and indeed completely off the record, conversations with their employees, although it will still of course be unlawful to discriminate within the context of such discussions. It also remains to be seen what the result of the consultation will be and what, if any, regulations would be introduced to reflect such a change.

Overall, there are a number of questions left unanswered by this announcement. Depending on the type of conversation that an employer wishes to have, it may



be worse for it to become a “protected conversation” on the basis that if it gave an employee a warning about their performance, the employer could not later rely on it at tribunal due to its “protected” status. It would seem that the new proposals are aimed at allowing employers to talk frankly about “off the record” issues without making them a formal process, such as retirement. However, it is difficult to see how this will work in practice given that an attempt to circumvent age discrimination claims will conflict with European legislation.

For now at least, any off the record chat with an employee (such as to offer a compromise agreement) must comply with the Without Prejudice rule and must therefore be set in the context of there being a genuine dispute capable of being settled

Vince Cable speech proposes further employment law reform plans

On the same day as the government issued its formal response to the consultation on “Resolving Workplace Disputes”, Business Secretary Vince Cable made a speech whereby he outlined plans for further employment law reform for the future.

In part, Dr Cable’s speech reiterated some of the proposals contained within the response to the consultation, such as the empowering of ACAS to “pre conciliate” in disputes before they reached the start of the Tribunal process.

However, the main new proposals he mentioned were as follows:

- ✓ Reviewing the Agency Workers Regulations 2010 in 18 months’ time;
- ✓ Simplifying National Minimum Wage legislation to collate one set of Regulations;
- ✓ Extending the right to request flexible working to everyone;
- ✓ Introducing different fees for different types of tribunal claims, possibly with higher fees for claims with a value of more than £30,000;
- ✓ Modernising the parental leave system to reflect the greater involvement of fathers in childcare;
- ✓ Improving CRB checks to make them accessible online;
- ✓ Clarifying whistleblowing laws to ensure that making a complaint about a breach of the employment contract will not amount to a qualifying disclosure.

In the remainder of his speech, Dr Cable then went on to state that the government will be calling for evidence (i.e. seeking views) on a number of other employment issues. These include the possibility of reducing collective redundancy consultation periods from 90 days to 60, 45 or 30 days, simplifying the TUPE 2006 Regulations (which may “unnecessarily gold plate the Acquired Rights Directive), introducing “compensated no-fault dismissals” for businesses with fewer than 10 employees and radically slimming down dismissal procedures, potentially by changing the ACAS code of practice.

These are all obviously fundamental proposals which will require separate consultation and we will keep you updated of developments as and when they are announced. The possible decrease to the “numbers” on collective redundancy consultation obligations would be an interesting and possibly worthwhile development, particularly for businesses which are actually closing down. However, “simplifying TUPE” is a much vaguer proposal and it is unclear which aspects of our TUPE Regulations the government thinks has gold plated the European legislation. Many employers will welcome the proposed “slimming down” of dismissal procedures, but again it remains to be seen what this will mean in practice.

Independent review into sickness absence

Dame Carol Black and David Frost CBE have presented a report to the government entitled “Health at Work – an independent review of sickness absence”. The aim of this report is to lower sickness absence levels in the workplace and in turn, reduce the amount of work lost due to ill health. Some of its key recommendations are to revise fit notes and to reconsider the prohibition on banning pre employment health questionnaires. The report also contains a proposal to establish an Independent Assessment Service to assess ill health and suggestions on how to improve management of sickness absence internally by managers.

In his speech on 23 November 2011 (see above), Dr Cable confirmed that the government would respond to this report next year and we will of course keep you updated on those developments.



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