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Newsletter April 2012

UK: Employment Update

This April Update reviews an important TUPE case that highlights the risks associated with a post-transfer relocation. This Update also examines recent decisions on accelerating an employee's termination date, what selection criteria may be used to choose who should be appointed to a new role following a redundancy exercise and how cost savings alone cannot justify discriminatory treatment. Finally we report on a Court of Appeal judge's warning about the inappropriate use of suspension.

TUPE: relocation is grounds for claiming constructive dismissal

The Employment Appeal Tribunal (EAT) has ruled that a proposed change in an employee's place of work upon a TUPE transfer was a substantial change in working conditions to the employee's material detriment. The employee could therefore treat himself as dismissed. It also held that the relocation amounted to a repudiatory breach of contract allowing the employee to resign and claim constructive dismissal.

The five claimants worked at a bus depot in Westbourne Park which was close to where they lived. Their bus route was then transferred to another operator, A. This was a service provision change for the purposes of TUPE. Prior to the transfer, the employer, CW, wrote to the employees advising them that after the transfer they would be employed by A, based at A's Battersea bus depot. None of the employment contracts had relocation clauses which would permit the employees to be moved to Battersea.

Key issues

All of the employees resigned because they objected to being based in Battersea as this would add up to two hours' travelling time to their working days. Four of the employees resigned from the transferee, A, on the day of the transfer, the fifth employee resigned from the transferor, CW, the day before the transfer.

The EAT agreed that from the subjective view point of the employees, the relocation and consequential extension to travelling time was both material and detrimental. Under TUPE the employees could therefore treat themselves as having been dismissed by their employer. As the dismissals were in connection with the TUPE transfer and were not for an economic, technical or organisational reason entailing changes in the workforce they were automatically unfair.

A inherited the unfair dismissal liability in relation to the four employees who TUPE transferred and then immediately resigned. Having regard to the fifth employee the EAT held that whether the transferor (CW), or transferee (A), was liable for the unfair dismissal would depend on whether the employee exercised his right to object to the transfer at the same time as resigning from his employment. If the employee had resigned but not objected to the transfer then the unfair dismissal liability would transfer to A. If the employee had objected to the transfer the unfair dismissal liability would remain with CW.

In any transaction to which TUPE applies, whether it is a business sale or a service provision change, if the transferring employees will be required to work from a new location following the transfer, the transferee could be exposed to either a claim of constructive unfair dismissal or a claim that the change in location amounts to a substantial change in working conditions to the material detriment of the transferring employees, allowing them to treat themselves as dismissed. The risk of such claims will depend amongst other things on the nature of any contractual relocation clauses and the personal circumstances of the employees. The transferee will inherit any unfair dismissal liability in the absence of the transferring employees exercising their right to object. Therefore depending on the commercial bargaining power of the parties the transferee may wish to secure some form of indemnity against this risk from the transferor or cost it into any pricing.

[Abellio London v Centre West Buses]

Age discrimination: costs alone cannot justify discrimination

It is a defence to a claim of indirect discrimination (on any of the protected grounds) that the provision, criterion or practice (PCP) complained of is objectively justifiable, that is, it is a proportionate means of achieving a legitimate aim. It is also possible to defend a claim of direct age discrimination on such grounds. An issue which has been subject to considerable legal debate is whether saving costs alone can be a legitimate aim to justify a discriminatory PCP or an act of direct age discrimination. Comments by the previous President of the EAT hinted that costs alone could, in certain circumstances, amount to a legitimate aim to justify indirect discrimination and/or direct age discrimination.

The Court of Appeal has now confirmed that the saving of cost must be combined with another legitimate aim in order to justify direct age discrimination and/or indirect discrimination.

In the case in question, W's role disappeared in a reorganisation. He occupied temporary positions for a 12 month period whilst an alternative role was looked for. Informal discussions had taken place with W for some time before he was then given 12 months' notice of dismissal prior to a formal redundancy consultation meeting taking place. The notice was served on a date that would ensure that it expired prior to W's 50th birthday when he would have been entitled to take early retirement. This would have given rise to significant additional cost to his employer of between £500,000 and £1 million. W was subsequently made redundant. He claimed unfair dismissal and age discrimination on the grounds that he had been served notice before the redundancy consultation meeting and this had been motivated by his age; any other employee younger than him would have had a redundancy consultation meeting first and then been served with notice of termination.

The Court of Appeal accepted that the timing of the dismissal notice prior to the planned redundancy consultation meeting was direct age discrimination, however, it was justifiable. The employer's objective was to achieve W's redundancy in a way that avoided the additional costs that would have been incurred if W had achieved early retirement. Given the facts of the case, the Court considered that W could have no right or expectation to enjoy enhanced pension benefits; he had been on notice for many, many months that he was potentially at risk of redundancy following the disappearance of his original role. In addition, the redundancy consultation process had been delayed for a number of reasons including the fact that W had been unable to attend scheduled meetings. If the process had commenced as originally anticipated, W could have had no reasonable hope of early retirement.

On these facts the Court of Appeal considered that the employer's redundancy consultation corner cutting did not deprive W of anything as he had clearly indicated he was only interested in other CEO jobs of which there were none. Whilst the process was tainted with age discrimination, the aim of achieving a redundancy without incurring additional expense was a legitimate aim and the procedural shortcuts had been a proportionate means of achieving that aim.

The Court stressed that discriminatory treatment aimed at saving or avoiding costs alone would not be capable of justification. Employers seeking to justify indirectly discriminatory practices or direct age discrimination must ensure they identify an underlying aim that is not purely economic.

[Woodcock v Cumbria Primary Care Trust]

Notice: how to accelerate an employee's termination date

The EAT has confirmed that an employer can bring forward an employee's termination date by serving a second notice of termination. C started employment on 1 September. His employer wished to bring the employment to an end prior to C accruing 12 months' continuous employment so C was sent a letter stating that his role would be redundant from 31 August. The HR manager then took fright and was concerned that C would accrue 12 months' continuous employment so a second letter was sent stating that the termination date would be 28 August.

The EAT rejected C's argument that the second letter was ineffective as the first letter had given notice of termination expiring on 31 August, which could not be withdrawn without C's consent that had not been given. The EAT held that the second letter constituted a new notice of termination with a revised termination date. It was not a variation of the first notice that would have required C's consent. The second letter therefore had the effect of shortening the notice period and depriving C of the necessary qualifying service to claim unfair dismissal.

This case illustrates that it will be easier for an employer to accelerate an employee's termination date by serving a fresh notice rather seeking to vary the notice date which can only be achieved by agreement with the employee.

[Parker Rhoes Hickmott Solicitors v Harvey]

Knee-jerk suspensions: grounds for claiming constructive dismissal

Recent obiter comments of the Court of Appeal should act as a warning to employers who routinely suspend employees at the beginning of disciplinary investigations.

It is clear that, in certain circumstances, it will be appropriate to suspend an employee, for example, if there is a risk that the employee may be in a position to cover up any wrong doing. A Court of Appeal judge has stressed that suspension should not be a knee-jerk reaction: warning that the routine, ill-considered use of the power to suspend can amount to a breach of the duty of trust and confidence towards employees. The judge considered that suspension will not always be in an employee's best interests as employees will frequently feel belittled and demoralised by a total exclusion from work and the enforced removal from their work colleagues which could be psychologically very damaging. Even if the employee is subsequently cleared of the disciplinary charges, suspicions may linger.

The ACAS Code of Practice of Disciplinary and Grievance Procedures makes it clear that in some cases a period of suspension with pay may well be considered necessary. However, the Code provides that:

- any period of suspension should be as brief as possible;
- it should be kept under review; and
- it should be made clear that the suspension does not itself amount to a disciplinary action.

Employers' disciplinary procedures should make it clear that suspension may be used in certain circumstances but that it does not denote guilt. Where an employee is suspended the suspension should be for the shortest period reasonably practicable in the circumstances and should not be operated routinely at the outset of every disciplinary investigation. It remains to be seen whether employees will seize on the comments of the Court of Appeal to use the fact of their suspension as a platform for claiming constructive unfair dismissal.

[Crawford v Suffolk Mental Health Partnership Trust]

Redundancy: selection process for alternative roles

Where an employer reorganises its workforce with the consequence that some roles are redundant and new roles are created, it is a common practice to invite potentially redundant employees to be invited to apply for the new roles that will be created.

During a redundancy selection exercise the EAT confirmed that an employer must apply objective selection criteria. However, in a situation where an employer is selecting employees to fill newly created roles following a redundancy exercise, then an employer is entitled to take a different approach and apply subjective selection criteria to select the candidate that will best perform in the new role. An employer is entitled to interview for a new role on a forward looking basis.

S decided to restructure its sales team and C's role became redundant as a consequence. C was invited to apply for one of the new roles within the organisation. He and another employee applied for the role but both were unsuccessful with the role eventually being awarded to an outside candidate. The EAT held that the dismissal was not unfair as the employer was entitled to apply subjective criteria to find the right person for the new role. Even if the new role was similar to the employee's old role, the employer was entitled to interview on a forward looking basis.

The EAT also made some general good practice recommendations for interviewers selecting for a new role:

- interviewers should discuss with one another the approach that they will follow;
- it is sensible for interviewers to discuss what they understand by any specified assessment criteria;
- it would be a good idea for interviewers to discuss in advance what they considered to be *"good answers"* to the questions asked;
- in a perfect world it would be ideal to record all questions and answers in full.

The EAT stressed however that any failure to take any of the above steps would not of themselves render an interview decision unfair. On the facts, C's suitability for the new role had been assessed in a formal interview process by two senior managers who had applied the identified criteria and made a systematic evaluation of his suitability in good faith. His dismissal was therefore fair.

[Samsung Electronics (UK) Limited v Monte-D'Cruz]

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