UK: Employment Update

Welcome to the March Employment Update. In this edition we set out the new unfair dismissal and redundancy pay limits that will apply in relation to dismissals taking effect on or after 6 April 2015. We also consider the Advocate General's Opinion on the trigger for collective redundancy consultation and Court of Appeal guidance on how to determine whether an employee transfers in the event of a service provision change and the extent to which an employer must investigate every aspect of an employee's defence.

Key issues

- New unfair dismissal and redundancy pay limits
- New rates of statutory maternity, paternity and adoption pay
- Redundancy consultation trigger: Advocate General's opinion light at the end of the tunnel?
- TUPE: how to assess whether there has been a service provision change transfer
- Shared Parental Leave Calculator
- Disciplinary Investigations: no stone unturned?

New unfair dismissal and redundancy pay limits

	2015	2014
Maximum amount of a week's pay*	£475	£464
Maximum statutory redundancy/basic award	£14,250	£13,920
Maximum unfair dismissal compensation award**	£78,335	£76,574
Maximum combined compensation for unfair dismissal	£92,585	£90,494

*For the purposed of calculating a statutory redundancy award or unfair dismissal basic award.

** Or 12 months' salary if lower than the cap.

The new rates will apply where the dismissal takes effect on/after 6 April 2015. The old rates will apply in relation to dismissals that have taken effect prior to that date but which are litigated after April 2015.

New rates of statutory maternity, paternity and adoption pay

	From April 2015	From April 2014
Standard rate: maternity/paternity/adoption/shared parental leave pay	£139.58	£138.18/week
Statutory sick pay	£88.45	£87.55

Redundancy consultation trigger: Advocate General's opinion light at the end of the tunnel?

According to some press reports Europe has now ruled that employers do not have to speak to employees before they dismiss them. These headlines were prompted by the AG's opinion on the question of what is the trigger for collective redundancy consultation?

Our domestic legislation, section 188 of the Trade Union Labour Relations (Consolidation) Act 1998 (TULRA), provides that the trigger for collective redundancy consultation is a proposal to dismiss 20 or more employees at one establishment within a 90 day period. However, in 2013 the Employment Appeal Tribunal (EAT) held that the words "*at one establishment*" should be disapplied as TULRA did not properly implement the Redundancy Directive.

That decision had far reaching consequences giving rise to a new world of collective redundancy consultation. Instead of aggregating the number of proposed redundancies at one unit/establishment employers now have to aggregate all proposed redundancies across their UK (and theoretically) global workforce in order to assess whether the threshold of 20 proposed redundancies is attained triggering the need for collective consultation. Failure to comply with the collective redundancy consultation obligation can give rise to a protective award of 90 days' pay (uncapped) per affected employee; the financial consequences of non compliance can therefore be quite considerable.

The case was referred to the European Court of Justice (ECJ) and the AG has now handed down his opinion. In essence he held that the Collective Redundancy Directive does not require that the numbers of dismissals should be aggregated in all of the employer's establishments in order to assess whether the collective redundancy consultation trigger has been achieved.

The AG considered that it was clear from earlier European case law that establishment means the "*unit to which the workers made redundant are assigned to carry out their duties"*. It is, however, for national courts to decide exactly how the local employment unit is constituted in each situation and that is a question of fact. Applying that definition of establishment to a situation where an employer operates a number of shops throughout the UK then each shop should in principle be regarded as an establishment. Where, however, a group of shops is clustered close together, for example in a shopping centre, the position may be less clear and it is conceivable that the cluster may be regarded as a single establishment depending on the organisational structure and the way in which the workforce is deployed.

The ECJ's decision will be handed down later this year; there is no absolute certainty that it will adopt the AG's analysis but it is thought that it is likely to do so. If it does then the case will go back to the Court of Appeal who will reverse the EAT's decision so that the number of proposed redundancies at one establishment will again be the trigger for collective redundancy consultation.

The Court of Appeal will still have to assess whether individual shops were establishments in their own right or whether the whole of the employer's retail business was an 'establishment'. In the case in question each shop had been treated as an establishment so collective redundancy consultation was not carried out in shops with fewer than 20 redundancies. If the whole retail business was an establishment consultation should have been carried out as the number of redundancies exceeded 20.

Until such time as the case returns to the Court of Appeal and it overturns the EAT decision (which it may not do) employers are strictly speaking bound by the EAT's ruling and should be aggregating proposed redundancies across the entire workforce to assess whether the collective redundancy consultation obligation has been triggered. Finally having regard to those newspaper headlines whether or not a particular redundancy situation is caught by the collective consultation regime employers do need to carry out individual consultation and in most cases this will involve speaking to the employees in question.

[USDAW and Wilson v VW Realisation 1 Ltd & Ors]

TUPE: how to assess whether there has been a service provision change transfer

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) operate to transfer employees' contracts of employment where a contractor stops carrying out activities for a client and those activities are either performed by another contractor, or, brought in house; i.e. there is a service provision change.

Which employees transfer in these circumstances? TUPE provides that employees in an organised grouping whose principal purpose is the carrying out of activities on behalf of the client will transfer. Although this sounds like a relatively straightforward concept there is a considerable body of case law addressing this issue. The case law to date has clarified that it is not enough that a group of employees 'happens' to spend all, or the majority, of their time performing activities for the client in order for them to transfer when there is a change in service provider. In order for the employees to transfer the employer must have consciously organised them into a grouping to provide the services to the client.

Recently the Court of Appeal has reviewed this case law and provided more guidance on how to assess whether an employee, or group of employees, TUPE transfers in the event of a service provision change.
C was employed to manage properties in the Netherlands owned by the R Group from May 2009 until 31 December 2010. For a short period C also managed some properties in Germany. She had no duties other than managing the Netherlands properties and no one assisted her in carrying out that work.

After C's employer, DJD, decided to withdraw from property management the R Group appointed a subsidiary, REM, to take over the management of the properties. The 31 December 2010 was the last day of C's employment with DJD and on 1 January 2011, C commenced employment with REM continuing to do the same job, i.e. managing the properties in the Netherlands.

Following her dismissal in September 2011 C brought an unfair dismissal claim against REM asserting that her employment had commenced in May 2009 and that she had TUPE transferred from DJD to REM on 1 January 2011. REM argued that there had been no TUPE transfer and therefore she had insufficient service to bring an unfair dismissal claim.

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After a review of the case law the Court of Appeal set out the test to be applied when assessing whether there had been a service provision change TUPE transfer; as follows:

(i) identify the service that was provided to the client;
(ii) list the activities which the staff of the outgoing service provider performed in order to provide that service;
(iii) identify the employee, or employees, of the outgoing service provider who ordinarily carried out those activities;
(iv) consider whether the outgoing service provider organised that employee, or those employees, into a "grouping" for the principal purpose of carrying out the listed activities.

Applying that test to the facts of the case the Court considered that the service which REM provided was managing all of the properties the R Group owned in the Netherlands.

The activities that REM performed in order to provide that service comprised: (i) administrative tasks at REM's London office; and (ii) periodic trips to the Netherlands in order to visit the properties. C was the employee who undertook all of the activities in connection with the properties. She devoted all of her time to those activities and no other employee provided any significant degree of assistance in the performance of that role. Most importantly C had been expressly instructed by her employer to carry out all of the activities which were necessary to provide the services required by R Group. It was not a matter of 'happenstance' that C was managing the properties. It was a positive decision of the employer which created the situation.

Accordingly as TUPE expressly provides that a single employee can constitute "an organised grouping of employees" the Court of Appeal held that C did constitute "an organised grouping of employees" and accordingly has TUPE transferred to REM. The fact that C had spent a short period of time managing properties in Germany did not affect he position.

The Court of Appeal has set out a useful test to be applied when assessing whether individuals form part of an organised grouping of employees for the purposes of assessing whether or not there is a service provision change TUPE transfer.

[Rynda (*UK*) *v Rhijnsburger]*

Disciplinary investigations: to what extent must an employer investigate every aspect of an employee's defence?

In order to dismiss an employee fairly for misconduct the employer must have a genuine belief that the employee committed the misconduct in question and have reasonable grounds for the belief. In order to have reasonable grounds the employer must have carried out as much investigation into the suspected misconduct as was reasonable in the circumstances. The final element of the 'fairness' equation is that the decision to dismiss must fall within a reasonable range of responses of a reasonable employer.

The Court of Appeal has recently considered whether a reasonable investigation requires an employer to investigate every aspect of the defence raised by an employee during the disciplinary process.

As part of S' job he travelled by car to see clients at home. He was entitled to mileage expenses for which he had to submit claim forms. An audit of S' mileage claims for a three month period found that the mileage claimed was almost twice as much as the journey distances on the AA route finder. The mileage claimed was also higher than the mileage claimed for the same journeys the previous year. This triggered a disciplinary process during which S offered a number of explanations for the discrepancies; difficulties in parking, one way road systems and road works causing road closures or diversions. S was dismissed for gross misconduct for fraudulently over claiming mileage.

S claimed unfair dismissal claim that the investigation was not reasonable because the employer had not attempted to recreate the journeys and had not explored all aspects of his explanations; for example by phoning the local authorities.

The Court of Appeal rejected this argument; it held that failure to investigate each line of an employee's defence will not invariably render an investigation unreasonable. Whilst an employer as part of its investigation must consider any defences raised whether and the extent it is necessary to investigate each will depend on the circumstances. The employer was investigating whether S had over claimed mileage expenses. The investigation had compared the mileages claimed with the AA figures and the mileage claimed previously for the same journey; in every case they were higher. The employer considered the various explanations of diversions etc but concluded that it was implausible that they were the reason why every single journey had a higher mileage. The Court considered that was a reasonable assessment and made it unnecessary to investigate the explanations any further.

[Shrestha v Genesis Housing Association Ltd]

Shared Parental Leave Calculator

The Department of Business Innovation and Skills has developed an online calculator to help employees calculate their shared parental leave and pay entitlement.

The calculator can be found at: https://www.gov.uk/pay-leave-for-parents.