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Newsletter

October 2015

UK: Employment Update

Welcome to the October Employment News in Brief. This month we consider what the new requirements to publish a slavery and human trafficking statement will entail. In addition we explore the implications of the ECJ's recent decision that the time spent travelling to and from customers is, in certain circumstances, working time. Finally we review two EAT decisions that consider what is an acceptable degree of involvement by HR in disciplinary decision making and whether employees absent on ill health grounds transfer under TUPE when there is a service provision change.

Modern Slavery Act 2015: Slavery and human trafficking statements – are you ready?

The Modern Slavery Act 2015 ("the Act") contains a number of provisions aimed at tackling modern day slavery. One of those provisions is a new requirement for "in scope" commercial organisations to produce a "slavery and human trafficking statement" for each financial year of the organisation.

A commercial organisation will be caught by this requirement if it supplies goods or services and has a total turnover of not less than £36 million.

A slavery and human trafficking statement ("SHT Statement") is a statement of the steps that the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place:

- in any of its supply chains, and
- in any part of its own business.

Alternatively the statement can simply state that the organisation has taken no such steps.

If an organisation so chooses, their SHT Statement can include information about:

- the organisation's structure, its business and its supply chains;
- its policies in relation to slavery and human trafficking;
- its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
- the training about slavery and human trafficking available to its staff.

If the organisation is a body corporate then the SHT Statement has to be approved by the Board of Directors and signed by a Director. If the organisation is a Limited Liability Partnership, the SHT Statement has to be approved by the members and signed by a designated member.

The Government has stated that it will produce statutory guidance on the obligation to publish a slavery and human trafficking statement that will address when the SHT Statement should be published, where it should be published and ideas as to how modern slavery can be identified.

It is not known when this guidance will be available although the Government has stated that it will be published to coincide with the SHT Statement duty coming in to force.

In the event that an organisation fails to comply with its obligation to publish a SHT Statement, proceedings may be brought by the Secretary of State for an injunction compelling performance.

It is anticipated that the SHT Statement provisions of the Act will come into effect in October 2015. The Government has indicated that transitional provisions will be developed so that SHT Statements will not be required where a business' financial year end is within close proximity to the date that the SHT Statement duty comes in to force.

Key issues

Organisations should consider what preparatory steps should be taken to ensure that they are in a position to meet their obligations to produce a slavery and human trafficking statement. Consideration should be given to:

- whether the organisation is caught by the new SHT Statement obligations at all;
- what form their first Slavery and Human Trafficking Statement ought to take;
- whether there will be adverse PR and business implications if a negative 'no steps' SHT Statement is produced;
- what, if any, training is currently provided to staff about slavery and human trafficking;
- what form training ought to take and what population of staff should be covered;
- whether new policies need to be introduced, or existing policies amended, to address slavery and human trafficking; and
- what terms should be included in supplier agreements to address the obligations under the Act.

[*Modern Slavery Act 2015*]

TUPE: Clarification on whether long term sick leavers transfer

In the context of transactions to which the Transfer of Undertakings (Protection of Employment Regulations) 2006 (TUPE) apply it has always been a thorny question what to do with employees who have been long term absent on ill-health grounds and who may benefit from permanent health insurance (PHI) arrangements under which they receive a salary substitute either directly from the insurer or from their employer. Do such such individuals transfer with the business?

The Employment Appeal Tribunal has recently considered this question in the context of a service provision change (SPC) to which TUPE applied.

E was employed by BT and was a member of a team dedicated to the DNO contract. The team working on the DNO contract had its own separate and dedicated structure within BT with its own managers, operatives, admin and other staff, budget and cost centres.

In 2006 E went on long term sick leave and was regarded as permanently incapacitated. He remained an employee of BT so that he could enjoy payments under its PHI scheme. After the liability of the insurers came to an end, BT continued to make payments to E and he remained on the books of the DNO group and payments to him by BT were treated as an expense of the DNO team. If E had returned to work it would have been as part of the DNO team.

After a tendering exercise in 2012 the DNO contract was transferred to Ericson in June 2013. It was accepted by BT and Ericson that there had been a service provision change and the DNO team employed by BT TUPE transferred to Ericson. The issue before the EAT was whether E was assigned to the group of employees that TUPE transferred as a result of the service provision change.

The EAT considered whether it was necessary for E to actually be involved in some way in the work carried out by the DNO team in order to be assigned to the organised grouping for the purposes of an SPC TUPE transfer.

BT argued that if E ever returned to work he would have been required to work in the DNO team therefore he was assigned to the DNO team for the purposes of TUPE. The EAT rejected this argument. It held that:

- The question whether an employee absent from work at the time of a service provision change was assigned to the relevant grouping was a matter of fact to be determined according to the circumstances of each case.
- There is a distinction between employees who are permanently unable to return to work and those employees who are temporarily absent from work.
- An employee who had no connection with the economic activity of the grouping and would never do so in the future (i.e. who is permanently absent) could not be regarded as assigned to that grouping.
- Mere administrative connection to the group of employees that transfer is not enough for the employee to be assigned to the grouping in the absence or some participation in the grouping's economic activities.

The EAT drew a clear distinction between permanent inability and temporary inability to work. In its view absence from work, even lengthy absence, as at the time of the service provision change, would not necessarily mean that an employee was no longer assigned to the grouping.

In cases where a sick employee is able to return and was likely to be able to do so in the foreseeable future the EAT considered that when assessing whether such an employee is assigned to the group of employees that provide the transferring services the answer to the question: 'to which grouping could the employee be required to work if able to do so' is relevant. If on the facts E has not been permanently incapacitated but expected to return to the workplace and required to return to the DNO team it is likely that a Tribunal would have found that he was assigned to the transferring team and accordingly would have TUPE transferred even though he was off sick at the time the team TUPE'd over.

This case provides useful guidance in relation to the transfer of incapacitated employees in the event of a service provision change. Employers must be careful to draw a clear distinction between employees who are permanently and temporarily incapacitated and treat these respective groups appropriately.

[*BT Managed Services Ltd v. Edwards & Another EAT/0241/14*]

Unfair dismissal: What is an acceptable degree of HR involvement in a disciplinary decision to dismiss?

When an employee is suspected of misconduct, an employer should in the normal course of events carry out an investigation prior to initiating any disciplinary process. It is usually advisable for different individuals to carry out the investigation and then the disciplinary process, where one is initiated. Often such individuals may seek guidance from their human resources advisers particularly if they have not been involved in such a process before.

The EAT has provided useful guidance on the extent to which HR can actively intervene in a disciplinary process without causing a dismissal to be unfair.

R was employed by the D who launched an investigation into potential misconduct by him in relation to his expenses and use of hire cars. G, a manager, was appointed to conduct the investigation and act as dismissing officer if necessary. G was inexperienced in disciplinary proceedings and during the course of preparing his report and decision he received advice from the D's HR department.

G's first draft report contained a number of findings favourable to R e.g. he found that R's misuse was not deliberate; there was no compelling evidence that R's actions were deliberate; and that the explanations given by R for petrol expenditure were "plausible" and that he had plausibly justified fuel use significantly in excess of that expected by his line manager. His first draft report concluded that he was minded to find that R was guilty of misconduct rather than gross misconduct and that he should be given a final written warning.

There were then various communications between G and HR and subsequent drafts became more critical of R culminating in a final report which stated that: "having given careful consideration to all of the facts of the case, I am minded to conclude that, on the balance probability, the Claimant is guilty of gross misconduct in respect of both the misuse of the corporate card and the misuse of hire cars funded by the Respondent. My recommendation is that he should be dismissed from his post."

The EAT considered the extent to which the decision to dismiss taken by G may have been improperly influenced by HR. It held that an employee facing disciplinary charges and a dismissal procedure is entitled to assume that the decision will be taken by the appropriate officer, without having been lobbied by other parties as to the findings he should make as to culpability, and that he should be given notice of any changes in the case he has to meet so that he can deal with them, and also be given notice of representations made by others to the dismissing officer that go beyond legal advice, and advice on matters of process and procedure.

The EAT clarified that an investigating officer is entitled to call for advice from HR but HR has to be very careful to limit advice essentially to questions of law, procedure and process and appropriate level of sanction to achieve consistency. HR must avoid straying into areas of credibility, culpability or the appropriate sanction in so far as the advice went beyond addressing issues of consistency. It was not for HR to advise whether the findings should be one of simple misconduct or gross misconduct.

[*Ramphal v Department for Transport EAT/0252/14*]

Working time includes travel to and from customer's premises: what are the implications?

The European Court of Justice (ECJ) has recently ruled that in certain circumstances the time spent by employees on daily travel between their homes and the premises of the first and last customer of the day was "working time" for the purposes of the Working Time Directive ("WTD").

T's business involved installing and maintaining security systems. Originally it had a number of offices in the provinces and employees would travel to those offices each day to pick up company vehicles and then travel on to customers. Their working time was calculated as starting when the employee arrived at the office to pick up the company vehicle and task list and finished when they arrived back at the office to drop the vehicle off.

After T closed all its regional offices each day workers were sent by mobile phone a task list setting out the customer appointment times and tasks. The employees then travelled by company car from their homes to the customers to install or maintain the security systems. The same vehicle was used to return home at the end of the day. Under these arrangements some of the workers travelled more than 100km between their home and the first and/or last customer of the day.

T determined the list and order of the customers to be followed by the employees and the times at which they had appointments with T's customers but the employees were free to get there via any route they wished provided that they arrived at the appropriate time. Under these arrangements, T did not count the time spent travelling between home and customers as working time but regarded it as a rest period. T calculated daily working hours by counting the time between when the employee arrived at the premises of the first customer and when the employee left the premises of the last customer of each day.

The ECJ commented that under the WTD there were two mutually exclusive concepts: "working time" i.e. any period during which the worker is at work, at the employer's disposal and carrying out his activity or duties, and the opposite concept of a "rest period". There was no intermediate category between working time and rest periods.

The ECJ held that the journeys to the customers designated by T were a necessary part of the duties and activities of T's workers. It considered that to classify the journeys as rest time would jeopardise the objective of protecting the safety and health of workers.

The ECJ also took into account the fact that T regarded those journeys as working time before the regional offices were closed showed that driving a vehicle from a regional office to the first customer and from the last customer to that regional office was previously among the duties and activities of the workers. The nature of the journeys had not changed only the departure point.

The ECJ acknowledged that the workers had a certain freedom that they did not have during the time spent working on a customer's premises provided that they arrived at the designated customer at the time agreed. Nevertheless, during those journeys the workers acted on the instructions of T who could change the order of the customers or cancel or add an appointment. The workers were not able to use their time freely and pursue their own interests. They were therefore at T's disposal.

The fact that such workers could conduct their own personal business at the beginning and end of each day did not in the ECJ's view affect the legal classification of journey time as working time. If this was a concern for employers then they should put in place the necessary monitoring procedures to avoid any potential abuse.

Accordingly the ECJ held that where workers use a company vehicle to go from their homes to the premises of a customer designated by their employer or to return to their homes from the premises of such a customer when they make those journeys they must be regarded as working for the purposes of the WTD.

Employers of peripatetic employees who have no fixed work place and who travel to clients or customers in company vehicles should clearly consider the implications of this decision on their current working arrangements. However the case may also have implications for employers of peripatetic employees with no fixed place of work who travel to customers or clients by other means such as hire cars, personal cars or public transport.

Where such employees receive an annual salary then a calculation should be performed to ensure that taking into account this travel time as working time, the individual is receiving the national minimum wage.

For those employees who are simply paid on an hourly basis, if this travel time is not currently paid then failure to do so could give rise to claims in the form of: (i) an unlawful deduction from wages claim on the basis that the individual is receiving no remuneration for this working time whereas he or she is entitled to at least the national minimum wage; or (ii) breach of contract.

The two year retrospective claims limit for wages claims means that an employer's exposure to such claims will be limited. However the time limit for breach of contract claims is six years in the county court or three months if the breach of contract claim is brought in the employment tribunal. So an employer could be exposed to such claims going back six years. In addition employers could be named and shamed for failing to pay the National Minimum Wage and possibly be exposed to financial penalties for not paying it.

Where payments have to be made to hourly paid employees these will of course have knock on implications for the rate of holiday paid when the individual takes holiday as such pay will have to be included in holiday pay calculations.

Going forward it is open to an employer to determine the rate of pay applicable to such 'travelling' working time and this may be at a rate lower than that applicable once the employee is at a client's premises. This pay differential combined with some form of in vehicle monitoring may help reduce any inappropriate use of such working time for personal purposes.

[*Federacion de Servicios Privados Del Sindicato Comisiones Obreras vs Tyco Integrated Security SL and another*]

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