Rollit Farrell & Bladon
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Employment Newsletter

TUPE - A Chance for some Clarity?

Since the decision of the ECJ in Suzen, predicting whether TUPE applies, particularly in the case of outsourcing arrangements or the transfer of contracts for services, has been plagued with uncertainty.

In that case the ECJ suggested the transfer of significant assets or a major part of the workforce was necessary. This had a serious impact on the security of workers in sectors such as cleaning, security and maintenance where the activity is often made up of the workers and sometimes little else.

Prior to Suzen there had been a concentration on whether the economic activity transferred retained its identity in the hands of the new contractor. This enabled most situations to be caught by TUPE and at least gave contractors a degree of certainty. The EAT in ***Cheeseman and Others -v- R Brewer Contracts Limited*** has now reaffirmed this as the decisive criterion and held that this may be considered by a Tribunal as on its own sufficient to trigger a TUPE transfer (although whether something retains its identity itself involves an examination of a number of factors). This conclusion, made in the context of the re-tendering of buildings maintenance contracts, harks back to the pre Suzen position. Nevertheless the EAT was forced to recognise that the ECJ has also said that the mere fact of similarity in activity before and after transfer does not justify the conclusion that there has been a transfer under TUPE. Oh dear!

We therefore have an obvious tension between the EAT wishing (although the EAT has hardly been consistent itself) to apply TUPE quite freely to outsourcing situations and the more restrictive approach of the ECJ.

Experience suggests that most Employment Tribunals prefer the approach which gives the protection to employees which was intended by the legislation in the first place.

The situation has hardly been improved by the latest ECJ decision on business transfers - ***Oy Liikenne Ab -v- Liskojärvi.*** This case involved the putting out to tender of various bus routes in Helsinki. A new operating company was awarded the contract for the existing routes, took on 33 out of 45 drivers but no buses or other assets. In this case the ECJ thought that the operation of the service required significant tangible assets and the fact that none had transferred was fatal to the employees.

Whilst the ECJ recognised that the importance of the transfer of assets will not be the same in every case, it is hard to imagine a Tribunal in the UK taking such a restrictive approach. The state of the law on TUPE remains an ever-shifting minefield.

Confusion could be resolved by the Government amending TUPE to include a clear stipulation that contracting out is covered regardless of whether or not the majority of the workforce transfers.

In fact, the Government has until 17 July 2001 to implement a new Directive amending the law on business transfers and has some important choices and options to make including:

- a new definition for a relevant transfer
- a new definition of "employee"
- new rules on information and consultation
- the possibility of joint liability between transferor and transferee
- the possibility of forcing outgoing contractors to provide employee information to successors
- the removal of the exclusion from TUPE of occupational pension schemes.

With this in mind we are holding workshop sessions on TUPE on Wednesday 11 and Thursday 12 July. Anyone interested in attending can contact Pat Coyle on 01482 323239 or by e-mail at pat.coyle@rollits.com

A DATE FOR YOUR DIARIES

Friday 11 May 2001

EMPLOYMENT LAW UPDATE - A SEMINAR

At the offices of

Rollit Farrell & Bladon

Wilberforce Court, High Street, Hull HU1 1YJ

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Changes in Entitlements

The following changes have recently been announced:-

Unfair Dismissal Compensation -

For dismissals on or after 1 February 2001 the maximum compensatory award is £51,700.

Redundancy/Basic Award in Unfair Dismissal -

For dismissals on or after 1 February 2001 a week's pay is increased to a maximum of £240.

Guarantee Pay for Statutory Lay Off -

Increased to £16.70 per day.

National Minimum Wage -

To be increased from £3.70 to £4.10 from October 2001 and to £4.20 from October 2002.

Statutory Maternity Pay -

To be increased from £60.20 per week to £75 per week from April 2002 and to £100 per week from April 2003.

Maternity Leave -

Ordinary maternity leave to be increased from 18 weeks to 26 weeks (paid) from April 2003.

Paternity Leave -

New right to 2 weeks paid paternity leave for working fathers from 2003 (to be paid at the same rate as the lower rate of statutory maternity pay).

Adoption Leave -

From 2003 an allowance for one of the adoptive parents to take paid leave for the same period and at the same rate of pay as maternity leave.

Bonuses - Discretionary (or not)?

In our last Newsletter we highlighted the case of ***Clark -v- Nomura International plc*** which held that an employer cannot always withhold a bonus even if it is termed to be discretionary - certainly where the decision not to pay is "perverse or irrational".

In the subsequent case of ***Manor House Healthcare -v- Hayes***, an employer decided to withhold letters notifying two employees of their bonus payments after the employees had tendered their resignation.

The EAT said it was necessary to consider whether the employer had exercised its discretion in good faith and not capriciously. If the employer did not then the bonuses were due to the employees

Contracts of Employment

Employers when offering management positions often negotiate special terms with an employee they wish to recruit. Subsequently standard terms and conditions of employment are issued. In ***Lovett -v- Wigan Metropolitan Borough Council*** the Court of Appeal has ruled that in these circumstances, if there is a conflict between the letter and the standard terms, it is the letter which prevails. To avoid problems of this kind occurring, employers are advised to ensure that their standard terms and conditions are amended to incorporate any specific terms e.g. pay reviews, holidays etc.

There has also been much discussion of late as to the status of a "pay in lieu of notice" clause. Where the employer reserves the right to give pay in lieu of notice this has the advantage of terminating the contract lawfully. However, the disadvantage was that the employer had to pay in full, even in the case of long notice e.g. 12 months, and the employee was under no duty to mitigate his loss by looking for and taking another job.

However, the Court of Appeal has now ruled that if a right to pay in lieu of notice is carefully drafted any monies due constitute damages and therefore the duty to mitigate applies. Accordingly earnings from another job can be offset - see ***Cerberus Software Limited -v- Rowley.***

PERSONAL DATA IN EMPLOYMENT - DRAFT CODE OF PRACTICE

A draft Code of Practice on the use of personal data in employer/employee relationships, has been issued. The draft Code aims to provide guidance to employers on how the Commissioner will interpret the provisions of the Data Protection Act 1998. It also goes further in outlining recommended standards and statements of policy and good practice which the Commissioner believes are in line with the intention of the Act.

In summary, the draft Code covers all aspects of the use, storage and management of personal data and records in various employment contexts from recruitment of employees to maintaining and disclosing personal records throughout employment. It also deals with issues and best practice concerning monitoring of employee's use of telephones, e-mail and the internet. Many commentators feel that the draft Code goes a great deal further than was originally the intention of the Data Protection Act 1998. Certainly, the Code has a wide ambit and in certain areas would be potentially in conflict with current employment legislation and practice if adopted. For this reason, there has been intense lobbying from employers' organisations who are hopeful of persuading the Commissioner to think again.

Dismissal for Misconduct and the Duty to Investigate

In ***John Lewis Plc -v- Coyne*** the EAT considered a case where an employee had been dismissed for contravening her employer's rule which prohibited personal telephone calls. She admitted that she had broken this rule which she claimed was in connection with difficulties of renting out her house and the need to contact the agency during office hours. Since she admitted that she made the telephone calls her employers dismissed her.

However, the EAT upheld the finding of the Employment Tribunal that the dismissal was unfair because the employer had failed to investigate the seriousness of the offence including the numbers of calls involved. The manager who dismissed her said he believed that one call justified summary dismissal. The decision to dismiss would depend not only on the number of calls but also the purpose of the calls where there was an element of personal crisis. Employers should also take into account whether the conduct was persistent. They also advised that the employer should assess behaviour by taking into account whether a particular employee was using the telephone more than others, whether only one person complained (and whether there was any motive for making the allegation) and whether the employee's calls had been condoned over a long period.

They advised that establishing dishonesty was a process involving two questions. Firstly, was what was done dishonest according to the standards of reasonable and honest people? If so, did the employee realise that what she had done was dishonest by those standards? They also warned that even where dishonesty was established (as opposed to breaking a company rule) it did not follow that the employer necessarily had to dismiss her. All the circumstances must be considered before the employer makes his decision.

Status of Agency Workers

One clear trend in UK Employment Law is to extend rights beyond "employees" to a wider category of workers. A recent decision of the EAT in ***Motorola Limited -v- Davidson*** has shown a willingness of the Courts to expand the scope of worker protection.

Mr Davidson worked at Motorola's site but under a contract with an employment agency as a temporary worker. Following a disciplinary hearing Motorola gave notice to the agency that they no longer required Mr Davidson's services. Mr Davidson brought a claim against Motorola for unfair dismissal.

Surprisingly, the EAT held that Mr Davidson was entitled to bring such a claim - he was to be regarded as an employee of Motorola. In particular, he received instructions from Motorola's employees, used their tools, wore a Motorola uniform and was subject to discipline and dismissal by Motorola's managers. For all practical purposes Motorola had control over Mr Davidson and it did not matter that the employment agency held at least a similar level of control.

There is now worrying uncertainty for employment agencies and clients as to whether the workers they utilise might have employment protection rights against one or the other.

RIGHT TO PAID HOLIDAYS

The Working Time Regulations 1998 provide that the right to 4 weeks paid annual leave does not arise until the worker has been continuously employed for 13 weeks. As a result, many temporary and casual workers do not qualify for paid holiday. The Advocate General has however given a preliminary opinion in the case of ***BECTU -v- Secretary of State for Trade and Industry*** that this provision is contrary to the Working Time Directive. It remains to be seen whether this is followed by the ECJ but obviously many employers will watch with interest.

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Lay Offs

Owing to the current difficulties facing the agricultural and other industries as a result of the Foot and Mouth outbreak many employers are faced with the prospect of having to either lay-off staff or consider making redundancies.

Employers should be aware that unless they have a contractual right to temporarily lay-off workers, then any enforced period of lay-off will be in breach of contract. The right to lay off may, however, be implied where there is an established custom and practice of lay-off in the particular industry.

In the event of any breach of contract, employees might be able to claim for any arrears of pay for the whole period when they are not working.

Alternatively, employees with over 1 year's service would be entitled to claim unfair dismissal if they resigned in response to the lay-off.

Where contracts allow for a temporary lay-off, then employers will still have to pay the minimum guaranteed rate of pay which is currently £16.70 per day for up to 5 days in any 3 month period.

Trade Union Recognition - Bargaining Units

The Central Arbitration Committee ("CAC"), the body set up to rule on matters relating to the statutory right of recognition for trade unions, has recently made one of its first decisions in the matter of ***Benteler Automotive UK -v- ISTC.***

The CAC had already allowed an application by the ISTC trade union for a recognition claim to proceed past the preliminary stage as it was satisfied that a majority of the workers within the bargaining unit proposed by the ISTC would favour collective bargaining. 57% of employees within the proposed bargaining unit were members of the union.

The CAC were then asked to decide upon the identity of the group of workers who would form the bargaining unit to which any recognition agreement would apply.

The union proposed that the unit should only include shop floor production operatives and material handlers as this group of employees, the union argued, were separate and distinct from Benteler's management, administrative and technical staff.

The employers argued for a wider unit covering the whole workforce (apart from the management) at the UK's only site in Corby. They contended that to limit the unit to shopfloor workers would place constraints upon the effective management of the Company, which was the main factor that the CAC had to consider when deciding upon the bargaining unit.

The CAC however did not share the Company's view. They decided that the bargaining unit proposed by the union was compatible with the existing management structure at the Company and therefore found that this should be the relevant unit for the purposes of collective bargaining.

The CAC have also now declared the ISTC as a recognised trade union entitled to conduct collective bargaining on behalf of the specific bargaining unit identified. This did not necessitate a ballot as the majority of the workers within the bargaining unit were members of the union. This may not have been the case had the wider group proposed by the Company been used (hence the Company's attempt to widen the potential electorate!).

Stakeholder Pensions

Stakeholder pensions came into being from 6 April 2001 and unless exempted, all employers will have to designate and provide access to such a scheme for their employees from 8 October 2001.

Employers who have fewer than 5 employees are exempt as are those who already offer group personal pension schemes with employer contributions of at least 3% or an occupational pension scheme. In either case to be exempt the schemes must be open to all employees aged 18 or over with qualifying service of no more than 12 months.

Otherwise, employers have an obligation to consult with their employees about the choice of a stakeholder scheme and provide information about it.

At present there is no compulsion on employers to contribute to such schemes but the facility must be provided for employees to make contributions via deductions from the payroll.

INFORMATION

If you have any queries on any aspect of employment law please contact:

Neil Maidment, Pauline Molyneux or Ed Duffield at Hull on (01482) 323239 or York on (01904) 625790

This Newsletter is for the use of clients and will be supplied to others on request.
It is for general guidance only. It provides useful information in a concise form.
Action should not be taken without obtaining specific advice.

The law is stated as at 1 April 2001.

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PART TIMERS & PENSIONS

The long running test cases on the rights of part-timers to join occupational pension schemes, ***Preston and others -v- Wolverhampton Healthcare NHS Trust***, are finally over. It had already been determined that such a bar may constitute indirect sex discrimination. However, important issues remained, such as who could claim and to what extent benefits could be backdated.

The House of Lords has now decided that the strict time limit for bringing claims of 6 months after employment has terminated is lawful. This will be a major disappointment for many thousands of women who were not aware of their rights to bring a claim until too late. However, those who have or can bring a claim within the time limit can backdate benefits to 8 April 1976 or the date they started their employment if later.

This ruling is of most advantage to women whose employer offered membership of a non contributory scheme. Such women will not be under any obligation to make backdated contributions of their own to qualify for pension benefits.