SLAUGHTER AND MAY

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Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

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Cases round-up

TUPE: No transfer of employee on permanent long-term sick leave

An employee who was on long-term sick leave and classed as permanently unable to return to work was not 'assigned' to an organised grouping of employees, and did not therefore transfer under TUPE on a service provision change, according to a recent judgment of the EAT (*BT Managed Services Ltd v Edwards*).

Team providing service: E was employed by BTMS as a Field Operations Engineer. He was a member of a team dedicated to a domestic network outsource (DNO) contract providing operational maintenance for the Orange mobile phone network. The DNO team had its own separate and dedicated structure within BTMS with its own managers, operatives, administrative and other staff, budget and cost centres, and its own operational unit code.

Sickness absence: In 2006, E went on long-term sick leave. Following unsuccessful attempts to find him less strenuous work (which lasted until 2008), he came to be regarded as permanently incapacitated without any prospect of returning to work. He was allowed to remain an employee in order to benefit from payments under a permanent health insurance (PHI) scheme. E was regarded as being 'on the books' of the DNO. After the PHI benefits were extinguished, BTMS made equivalent payments to him.

TUPE transfer: In June 2013, the DNO contract was transferred to a third party (X). It was accepted that the DNO team was an organised grouping of employees having as its principal purpose the carrying-out of activities for a client, and that there was a service provision change under TUPE. However, X did not accept that E transferred with the group, arguing that he was not 'assigned' to the DNO team. The Tribunal upheld X's position, and BTMS appealed.

No assignment: The EAT dismissed BTMS's appeal. It held that:

- Whether an employee absent from work at the time of a service provision change is assigned to the relevant grouping is a matter of fact to be determined according to the circumstances of each case.

- Although absence from work, even lengthy absence, at the time of the service provision change will not necessarily mean that an employee is no longer assigned to the grouping, an employee who has no connection with the economic activity of the grouping (and will never do so in the future), cannot be regarded as assigned to that grouping.

- A mere administrative or historical connection to that grouping is insufficient to constitute an employee being assigned to it. There must be some level of participation or, in the case of temporary absence, an expectation of future participation in carrying out the relevant activities of the group.

- The question of whether the employee could have been required to work in the grouping, if he able to do so, has no relevance where the employee is permanently unable to contribute to the economic activity carried out by the grouping. This criterion is only useful in cases where an employee is able to return to work at the time of the service provision change, or is likely to be able to do so in the foreseeable future.

No transfer of E: On the facts, although a link remained between E and the DNO team, that link served only administrative purposes, and it was not contemplated that E would thereafter provide any work or carry out any of the activities under the DNO contract. The EAT therefore concluded that E's employment did not transfer to X.

What type of absence? This case was on quite extreme facts, but demonstrates that when considering assignment of absent employees, there is an important distinction between temporary absence and permanent absence. If absence is temporary (such as holiday or maternity leave, and potentially suspension), the employee will usually remain assigned. The same is true for short-term sickness

absence. It is only when such absence is sufficiently long-term that it has become 'permanent' that the employee may no longer be assigned (and will remain with the transferor).

Subject access requests: what is reasonable and proportionate?

The High Court has given useful guidance on the scope of the obligation to respond to a subject access request (SAR) under of the Data Protection Act 1998 (DPA 1998). Although the case arose in a non-employment context, it will be useful for employers who receive SARs from their current or former employees (*Dawson-Damer v Taylor Wessing LLP*).

SARs: A number of claimants (family members) lodged SARs against a solicitors' firm (TW) which was acting for the respondent in the context of ongoing litigation in the Bahamas. When TW refused to comply, the claimants sought an order forcing TW to comply with their SARs under section 7(9) DPA 1998.

Order refused: The High Court refused to make the order. The Court's judgment is useful for a number of reasons:

- *Purpose and motive of SARs:* The Court noted that the purpose of a SAR is to enable a data subject to check the accuracy of the information held by the data controller (and to have it corrected if necessary), as well as to check whether the processing of their data unlawfully infringes their privacy (and if so to take steps to prevent it). It was not to enable a data subject to obtain discovery of documents that may assist him in litigation of complaints against third parties (as was found to be the case here).

- *Disproportionate effort*: As regards the disproportionate effort exemption in section 8(2) DPA 1998, the Court noted that a data controller is only required to supply such personal data in response to a SAR as is found after a reasonable and proportionate search. On the facts, the Court found that it was not reasonable or proportionate for TW to carry out lengthy and costly searches of files dating back at least 30 years to determine whether or not information was protected by legal professional privilege (where privilege depended on Bahamian law, and would involve costly and time-consuming consideration by skilled lawyers).

- *Relevant filing system:* The Court also found that for SAR purposes, a manual filing system must consist of manual records of sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system. On the facts, some of the information was loose leaf in boxes containing multiple categories of information that were not structured as regards individuals, and were not filed chronologically. This was not found to constitute a relevant filing system under section 1(1) DPA 1998 (and as such fell outside the scope of the SAR).

Points for employers: SARs are often made in the employment context as part of a "fishing expedition" to flush out material which may be useful to the employee in bringing proceedings against the employer (and/or to put the employer under pressure to enter into a settlement agreement rather than deal with the SAR). This case provides employers with some useful arguments in response to such SARs.

Court of Appeal rejects latest challenge to ET and EAT fees

The Court of Appeal has rejected Unison's latest challenge to the introduction of fees for employment tribunal claims and appeals to the EAT (*R (on the application of Unison) v Lord Chancellor (Equality and Human Rights Commission intervening)*).

No breach of EU effectiveness principle: The Court found that Unison had not provided sufficient evidence that the fees regime breached the EU law principle of effectiveness. Although the statistics showed a dramatic fall in the number of ET claims since fees were introduced, this did not prove that any individual had been prevented from pursuing a claim to enforce an EU-derived right. Further, the

fact that the Lord Chancellor retained discretion to grant remission to those claimants who did not meet the remission criteria in exceptional circumstances meant that the regime did not inherently result in claimants being unable to bring proceedings, or that the principle of effectiveness had been breached.

No indirect discrimination: The Court also found that the fees regime is not indirectly discriminatory against women. It accepted that there was a disparate impact on women, insofar as the proportion of women whose claims attracted higher fees was greater than the proportion of women whose claims attracted lower fees. However, it found that this disparate impact was objectively justified by the legitimate aims of (i) transferring a proportion of the running costs of ETs and EATs to service users who could afford it; (ii) improving efficiency by deterring unmeritorious claims; and (iii) encouraging alternative means of dispute resolution.

What future for fees? Despite the Court of Appeal's judgment, the future of ET and EAT fees remains uncertain:

- Unison has sought permission to appeal to the Supreme Court.
- The Ministry of Justice is currently undertaking a review of ET and EAT fees (see Employment Bulletin dated 25th June 2015, available here), which is expected to conclude later this year.
- The Court of Appeal commented that the decline in ET claims following the introduction of fees has been '*sufficiently startling to merit a very full and careful analysis of its causes*'. It also stated that if there are good grounds for concluding that part of the decline is accounted for by claimants being realistically unable to afford to bring proceedings, the level of fees and/or the remission criteria will need to be revisited.
- The Scottish government has recently published its Programme for Scotland 2015-16 "A Stronger Scotland", which includes plans to abolish fees in Scottish employment tribunals.

Points in practice

Modern slavery: new disclosure requirements from October 2015

The Government has published its response to the public consultation on reporting requirements under the Modern Slavery Act 2015. This reveals that from October 2015, commercial organisations with a global turnover of £36 million or more, and carrying on any part of their business in the UK, will be required to publish on their website (every year) a slavery and human trafficking statement. The £36 million turnover threshold coincides with the Companies Act 2006 threshold for large companies, meaning that such companies will be caught.

The statement must describe the steps taken (if any) to ensure that modern slavery is not taking place in the organisation's business and its supply chains. The framework in the 2015 Act requires the statement to cover five key areas:

- A brief description of the organisation's business model and supply chain relationships;
- Policies relating to modern slavery, including the auditing and due diligence processes which have been implemented;
- Training for those in supply chain management and the rest of the organisation;
- The principle risks relating to slavery and human trafficking, including how those risks are evaluated and managed; and
- Key performance indicators which will allow third parties to assess the effectiveness of the activities described in the statement.

Although the reporting requirement will apply from October 2015, it is envisaged that there will be transitional provisions which will not require statements to be published where a business's financial year end is around October 2015.

New ACAS guides on recruitment and induction

ACAS has published two new guides on recruitment and induction, each including a number of tools and templates.

The Guide on Recruiting Staff covers issues hiring staff, essential documents, tips on advertising jobs and considerations on choosing candidates, how to recruit without discrimination and handle pay queries, and advice regarding criminal records.

The Guide on Starting Staff: Induction gives advice on what an employer should do before an employee starts, and things to be done throughout their first year in an organisation. Specific guidance is also given on recruiting young individuals, such as school, college and university leavers. Tips include having an induction checklist and introducing a 'buddy system' for the first week an individual spends in a company.

New measures to boost apprenticeships

From 1st September 2015, all government procurement bids for contracts of £10m or more which have a duration of a year or longer must demonstrate a clear commitment to apprenticeships. Businesses bidding for relevant contracts will be required to demonstrate that a 'reasonable proportion' of their workforce is in an apprenticeship or training programme, and to propose the number of apprenticeships they expect to create when fulfilling the contract. This projection will then be reviewed as part of the tender evaluation process, and written into the contract. If the supplier does not meet this commitment, it is envisaged that the contracting authority will take action against it.

The Government has also launched a consultation on proposals to introduce an apprenticeship levy in 2017. It reveals that a levy is currently used in 50 countries to finance apprenticeships (including the Netherlands and Denmark), while the amount of money UK businesses invest in training has fallen consistently over the last 20 years. Under the proposed system, employers who contribute funds will have a say in how apprenticeships are run, and will have direct spending power.

The consultation seeks views on the implementation of the levy, in particular:

- how 'large employers' (who will be subject to the levy) should be designated (for example, by number of employees);
- how the levy should be paid;
- how the levy should work for employers who operate across the whole of the UK (given that apprenticeships is a devolved policy in Wales, Scotland and Northern Ireland);
- how the levy should work in the construction and engineering construction industries, where companies currently already pay training levies; and
- how best to give employers control of apprenticeships.

The consultation closes on 2nd October 2015. More detail on the scope and rate of the levy is expected later this year.

New enforcement measures for NMW/NLW

The Government has announced new enforcement measures to ensure employers observe the national minimum wage (NMW) as well as the new national living wage, when it is introduced (NLW). The new measures include doubling the current penalties (although the overall maximum will remain at £20,000 per worker), ensuring anyone found guilty will be considered for disqualification from being a company director for up to 15 years, increasing the enforcement budget, setting up a new team within HMRC for criminal prosecutions and creating a new director of labour market enforcement and exploitation. In addition, the Government has announced that in Autumn 2015 it will consult on the introduction of a new offence of aggravated breach of labour market legislation.

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