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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: employee assigned to organised grouping despite client's removal instruction

An employee remained assigned to the organised grouping of employees which was the subject of a service provision change (SPC), despite an instruction from the client that she be removed from the services under the contract, given that the employer disputed the instruction and did not act on it until after the transfer, according to a recent judgment of the EAT (*Jakowlew v Nestor Primecare Services Limited t/a Saga Care*).

Client's instruction to remove employee: J was employed by NPS and worked principally on a contract for the London Borough of Enfield (LBE). Following an incident in February 2013 involving J and two other colleagues, all three were suspended by NPS. LBE expressed its concern about the incident, and ultimately on 19th June 2013 invoked a right under its contract with NPS to require the removal of all three employees from the provision of the services.

Employer objects: NPS objected to the instruction on the basis that it was unreasonable and vexatious (and therefore outside the terms of the contract). It concluded its disciplinary proceedings against J on 28th June 2013 by issuing her with a written warning for conduct. LBE never resiled from its instruction in relation to J, although it did in relation to one of the colleagues.

SPC – did employment transfer?: NPS's contract with LBE came to an end on 30th June 2013, and a new service provider (W) took over the contract. NPS and W agreed that J's employment did not transfer and that she remained employed by NPS. NPS dismissed J by reason of redundancy, and she issued unfair dismissal proceedings against NPS and W. The Tribunal dismissed her claim, finding that her employment did not transfer to W, since at the material time she was not assigned to the organised grouping, in light of LBE's instruction.

Suspension does not prevent assignment: The EAT allowed J's appeal. It held that suspending an employee pending disciplinary proceedings does not necessarily have the effect of removing him from the organised grouping of employees to which he belonged. The EAT saw this as analogous to other categories of excusal from attendance at work like holiday, study leave and sickness absence, since the expectation of the parties would be that, if the disciplinary proceedings did not end in demotion or transfer, the employee would return to work in the group to which he had belonged.

Employer's response to instruction is key: The EAT distinguished its previous decision in *Robert Sage Ltd T/A Prestige Nursing Care Ltd v O'Connell* (see our Employment Bulletin dated 26th March 2014, available here), where an employee who was suspended at the time of the transfer was found not to be assigned to the organised grouping of employees. In that case, the employer accepted the client's request and informed the employee that she could not return to work on the services. The same could not be said on the present facts. Unless and until the employer takes the decision to remove the employee from the services, the client's instruction had no effect for TUPE purposes.

Lessons for clients: Clients who wish for one of their service provider's employees to be removed from the provision of the services should ensure that they have the contractual authority to require the service provider to remove that employee, in order to avoid any suggestion that the suspended employee remains assigned to the provision of the services.

No implied duty on employee to disclose prior allegations of misconduct

An employee's failure to disclose an allegation of impropriety made against him in the context of separate employment did not justify his dismissal, where there was no express or implied contractual obligation requiring such disclosure (*The Basildon Academies v Amadi*).

Allegations against employee: A was employed by BA on a part-time basis, working on Thursdays and Fridays as a tutor. In September 2012, he accepted a zero-hours contract to work between Monday and Wednesday at a separate college. In December 2012, A was suspended by the college when a female pupil alleged that he had sexually assaulted her. A was also arrested, although no charges were pursued by the police. A did not inform BA of these incidents.

Employee dismissed: The police informed BA of A's suspension in March 2013, whereupon BA suspended A. Following a disciplinary hearing, BA concluded that A had decided deliberately not to inform it about his employment at the college and the allegation of sexual misconduct. It took the view that both were acts of gross misconduct, and so dismissed him. The Tribunal upheld A's unfair dismissal claim, on the basis that BA was not entitled to treat A's failure to inform it about the allegation as gross misconduct in the absence of any clear policy or contractual term requiring him to disclose such information.

No express obligation to disclose: The EAT dismissed BA's appeal. It noted that A was under an express contractual obligation to disclose any conviction or caution for any criminal offence, as well as any impropriety committed by himself or other employees relating to his employment with BA. However, he was under no express obligation to report allegations of impropriety made against him otherwise than in relation to his BA employment.

No implied obligation to disclose: The EAT also rejected BA's argument that A had breached an implied obligation to report the allegations against him. The EAT found that is clearly not the law that an employee must disclose to the employer any allegation of impropriety, however ill-founded (such a duty would typically only attach to fiduciaries, such as directors and trustees). That being so, it was difficult to see how A's omission could amount to misconduct at all, let alone misconduct sufficient to justify dismissal.

Lessons for employers: Employers should consider imposing express contractual obligations on employees to disclose allegations of impropriety against them, and ensure that these are wide enough to catch allegations made outside of the immediate employment context but which may impact on their employment.

Discrimination against Christian worker who expressed her beliefs on homosexuality

A Christian nursery assistant who was dismissed based on her responses to questions from a lesbian colleague about her beliefs on homosexuality has won her high-profile discrimination claim. The employer was found to have insufficient grounds for its decision to dismiss, which was in fact based on a stereotypical view of evangelical Christians (*Mbuyi v Newpark Childcare (Shepherds Bush) Ltd*).

Colleagues discuss homosexuality: M, an evangelical Christian, was employed by NC as a nursery assistant. One of her colleagues was LP, a lesbian who lives with her civil partner. On 6 January 2014, LP and M discussed what they had done over the Christmas break, with M making reference to activities at her church. LP indicated the she would not be interested in attending church until it would recognise her relationship such that she could get married there. M responded with her understanding of biblical teaching on homosexuality, including a reference to homosexuality being a sin (albeit in the context that *'we are all sinners*'). LP was upset by the discussion and left the room. A manager sent her home for the day, and M was called to a disciplinary hearing.

Employee's beliefs: At the hearing, M maintained that LP had moved their conversation onto the church and sexuality. M sought to explain her comments by stating '*I can only tell the Biblical truth. I am not a homophobic person but I believe homosexuality is a sin and God doesn't like that*'. NC asked whether M considered LP 'wicked' to which she responded 'we are all wicked'.

Dismissal and claim: NC decided that M should be dismissed for gross misconduct. The dismissal letter characterised the exchange of 6 January as discriminatory and 'wholly inappropriate', and also made reference to earlier comments to LP that had not been raised in the disciplinary hearing. M was accused of classifying LP as 'wicked' and deliberately targeting LP because of her sexual orientation. M brought an employment tribunal claim alleging

harassment and direct and indirect discrimination on grounds of religion or belief.

No harassment: The Tribunal dismissed the claim of harassment, observing that M had regarded the questioning about her beliefs as a good thing, which enabled her to show who she was. It followed the conduct was not unwanted, nor did it violate M's dignity.

Direct discrimination: The Tribunal noted that the dismissal letter referred to allegations which had not been put to M at the disciplinary hearing, and accused M of targeting LP when the evidence did not support this conclusion. The Tribunal therefore concluded that NP had acted on the basis of stereotypical assumptions about M and her beliefs. It relied on the fact that LP, who had initiated the conversation around religion in contravention of NC's policies, had not received any form of censure. The result was that M's direct discrimination claim was upheld.

Indirect discrimination: The Tribunal also allowed M's indirect discrimination claim. NC conceded that its policy that employees should not express any adverse views of homosexuality placed M and others sharing her beliefs at a particular disadvantage. The Tribunal accepted that NC had the legitimate aim of providing its services in a non discriminatory way. However, it concluded that NP's actions were not proportionate, given that LP had not been treated equally, M had not been warned that any repeat of the comments would lead to dismissal, and NC had not explored with M and LP an agreement about appropriate conduct going forward.

Policies on sensitive workplace discussions: This case shows the importance of having (and enforcing) a policy regarding the discussion of sensitive matters such as religion and sexuality in the workplace. The Tribunal criticised NP for not involving both LP and M in discussions about what had happened, and suggested that both could have been asked to confirm that discussing matters of religion and sexuality at work was inappropriate. Had this been done and a further incident occurred, the Tribunal suggested that a non-discriminatory dismissal could have been possible.

AG Opinion: travelling time for peripatetic workers counts as working time

The time spent by peripatetic workers (i.e. workers who are not assigned to a particular place of work) travelling from home to a place of work in the morning, and returning home in the evening, should be treated as 'working time' under the EU Working Time Directive (WTD), according to a recent Advocate General's Opinion (*Federación de Servicios Privados del Sindicato Comisiones Obreras v Tyco Integrated Security SL*).

Travelling time is working time: The case concerned Spanish engineers, who installed and maintained security equipment in homes and businesses. The AG found that for such peripatetic workers, travelling is an integral part of their work. They could also be classed as being 'at the employer's disposal' (as per the definition of working time in Article 2 WTD) during such time, since they were travelling to customers determined by their employer, via a route determined by their employer, in order to provide services for their employer. The AG rejected the suggestion that the employees would take advantage of the journeys at the beginning and end of the day to carry on their personal business. Such a fear was in his view not sufficient to alter the legal nature of the journey time; it was up to the employer to put in place the necessary monitoring procedures to avoid any abuse.

Implications in the UK: Although this is a Spanish case, it may also have implications for UK law. The Government guide on 'Maximum weekly working hours' states that working time includes 'time spent travelling for workers who have to travel as part of their job, e.g. travelling sales reps or 24-hour plumbers' but does not include 'normal travel to and from work'. If the AG's Opinion is upheld by the ECJ, this may necessitate a change in approach for UK employers who (in line with the Government guidance) do not currently treat such travelling time as working time.

Points in practice

HMRC reminder letters on registration of share schemes and annual returns

HMRC has reportedly sent reminder letters to remind companies that the last filing date to HMRC for 2014-15 annual share scheme returns is 6th July 2015. The letter sets out how schemes should be registered, what happens if a scheme has been registered incorrectly, how to submit a share scheme annual return and the penalties for late or incorrectly completed returns.

If you have not already registered your schemes, you should aim to do so as soon as possible. If you require any assistance with this process, please speak to your usual Slaughter and May contact.

Responses to EBA consultation on CRD IV remuneration guidelines

A number of responses have been published on the European Banking Authority (EBA)'s consultation on its draft guidance on sound remuneration policies under CRD IV. Amongst other things, the consultation suggests a significant narrowing of the proportionality principle, which currently allows smaller firms to disapply various provisions of CRD IV.

- The British Bankers' Association (BBA)'s response reveals that whilst it is broadly supportive of the revised guidelines, its members are concerned about the removal of the proportionality principle, and suggests that the EBA thinks again about this aspect of its guidance. The BBA is also concerned that the application of the 1:1 ratio (or 2:1 with shareholder approval) to the vesting of LTIPs will make the use of LTIPs unattractive and may result in increases in fixed pay as an alternative. It argues that applying the ratio to the valuation of such awards at face value upon granting, assuming maximum vesting, would be a preferable approach.

- The Alternative Investment Management Association (AIMA)'s response strongly disagrees with the EBA's interpretation of the proportionality principle, stating that the approach is contrary to the express wording of the CRD IV text, the Treaty of the European Union and case law (a view which is echoed in the City of London Law Society (CLLS)'s response). AIMA also disagrees that the guidelines on remuneration should apply to staff of delegate entities of a CRD IV group company. It points out that the level 1 CRD IV remuneration provisions do not mention that certain requirements should apply to the staff of entities who are not within the CRD IV group.

- Finally, the European Fund and Asset Management Association (EFAMA)'s response expresses similar concerns regarding the proposals relating to the proportionality principle and the scope of the guidelines on remuneration. It calls on the EBA to work with the European Securities and Markets Authority (ESMA) to ensure a co-ordinated approach to applicability of the proportionality principle in their respective remuneration guidelines (especially regarding the remuneration rules under the Alternative Investment Fund Managers Directive (AIFMD) and UCITS IV Directive, which lie within the remit of ESMA).

The EBA's consultation closed on 4th June 2015. It remains to be seen whether (and to what extent) the concerns expressed in the above responses are taken into account by the EBA.

Review of employment tribunal fees announced

The Ministry of Justice (MoJ) has announced a review of the impact of employment tribunal fees, to consider how effective the introduction of fees has been at meeting the original financial and behavioural objectives, while maintaining access to justice. The review will also consider the effectiveness of the fee remissions scheme.

The MoJ has set out terms of reference for the review. It will take into account:

- tribunal data on case volumes, case progression and case outcomes;
- qualitative research on the views of court and tribunal users;
- general trends of the number of cases appearing at tribunals before the fees were introduced;
- consequences arising as a result of an improved economy on the number of people being dismissed;
- to what extent there has been discouragement of weak or unmeritorious claims;
- whether there has been any impact because of changes in employment law; and
- other reasons for changes in user behaviour.

The MOJ confirmed the review will make recommendations for any changes to the structure and level of fees for proceedings in the employment tribunals and the employment appeals tribunal, including recommendations for streamlining procedures to reduce costs. The review is expected to be completed later in 2015, and the MoJ confirmed it will consult on any proposals for reforms in due course.

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