SLAUGHTER AND MAY/

NEWSLETTER

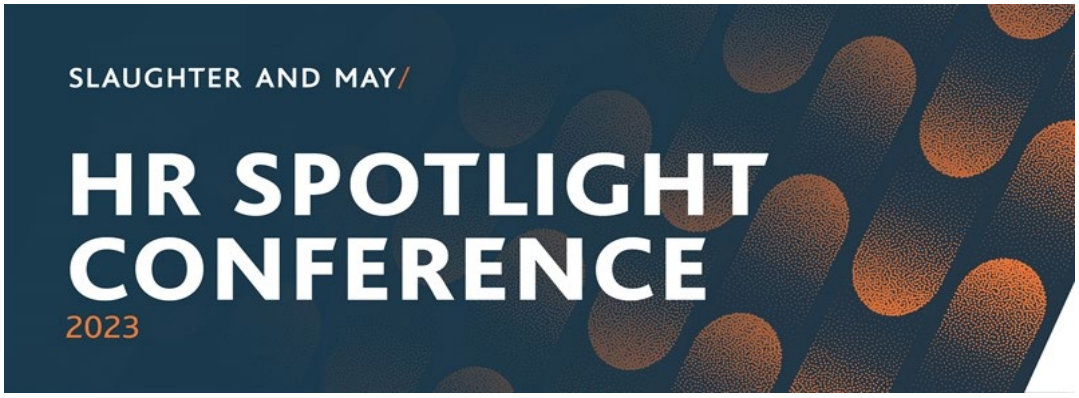
SEPTEMBER 2023

EMPLOYMENT BULLETIN

QUICK LINKS

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

HR SPOTLIGHT CONFERENCE



Wednesday 20 September 2023

08:30 - 12:00 (BST)

We are delighted to invite you to our HR Spotlight conference on Wednesday 20 September 2023. Our employment and incentives experts will guide you through the key HR issues currently affecting UK employers.

The conference is designed to equip senior individuals with an employment or incentives remit with the latest legal and market analysis and the opportunity to share experiences, insights and ideas.

The morning will begin with a networking breakfast for those who are able to attend in person. Our speakers will then present their thoughts on:

- **Employment law in 2024** – what key priorities will the changing landscape bring?
- **Workplace culture** – how have expectations shifted, and how should employers react?
- **Executive remuneration** – what has 2023 told us about shareholders' current expectations on directors' pay?
- **Reward in a changing world** – how might companies operate their remuneration arrangements in a fluctuating political and economic environment?

For the executive remuneration session, we will be delighted to be joined in our discussions by Lorna Dodson, partner at remuneration consultancy Ellason LLP, who has significant experience in supporting a range of remuneration committees across all aspects of the reward agenda.

Please click here for further details and to register for the event.

RIGHT TO PARTICIPATE IN SHARE INCENTIVE PLAN TRANSFERRED UNDER TUPE

Summary: The Court of Session in Scotland confirmed that an employee who transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) was entitled to the provision of an equivalent share incentive plan to that operated by the transferor. Although the employee had been a member of the transferor's plan under the terms of a Partnership Share Agreement rather than under his contract of employment, the Court found that the obligations created by the plan arose in connection with his employment contract for the purposes of a transfer of liabilities under TUPE (*Ponticelli Limited v Gallagher*).

Key practice point: The effect of TUPE is that the transferee stands in the shoes of the transferor as regards the employees after the transfer. Under Regulation 4(2) of TUPE, whether the liability under a share scheme transfers depends on whether the participation in the scheme is contractual and, if so, whether participation arises "*under or in connection with*" the employee's contract of employment. The Court of Session's decision, which we expect to be followed by tribunals in England, confirms that TUPE can cover share scheme benefits even where the contractual documentation containing the right to participate is separate from the employment contract. If, as in this case, the transferee does not provide, or cannot replicate, the transferor's scheme, it has to provide an alternative of "substantial equivalence". It is important that the existence of collateral contracts providing share scheme or other benefits is picked up by due diligence enquiries in any transaction.

Facts: The claimant's contract of employment transferred to Ponticelli under TUPE. Prior to the transfer, he had been a member of a Share Incentive Plan (SIP) which he had joined under a Partnership Share Agreement with the transferor and the plan trustees. Participation in the plan was voluntary and it was not mentioned in the contract of employment. The transferee declined to provide an equivalent scheme, and the claimant contended that he was entitled to be a member of a SIP of "substantial equivalence" to the transferor's plan, his right to participate having transferred under TUPE. The Employment Tribunal and Employment Appeal Tribunal upheld his claims. The transferee appealed, maintaining that the obligations did not arise either "under" or "in connection with" the contract of employment as required by TUPE.

Decision: The Court of Session rejected the appeal. The Tribunal had been correct to conclude that the obligations of the transferor under the Partnership Share Agreement fell within the scope of Regulation 4(2). The wording in TUPE was clearly wide enough to cover obligations not contained within the contract of employment; previous cases had interpreted them widely, for example to include liability for personal injury. The rights and obligations under the SIP formed an integral part of the claimant's overall financial package. For each share purchased by salary deduction, the transferor employer had contributed funds for the purchase of two further matching shares and there were other optional benefits including the opportunity to participate in an arrangement which linked the award of further shares to the employer's bonus scheme.

The Court of Session commented that a restrictive interpretation of Regulation 4(2), confining it to the employment contract, would enable employers to subvert the protections in TUPE simply by creating separate contracts to confer benefits additional to basic salary.

EAT GUIDANCE ON ASSESSING THE DATE OF A TUPE TRANSFER

Summary: The Employment Appeal Tribunal (EAT) has confirmed that the date of a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is not necessarily the date of the last transaction in a series; it can be earlier. The EAT also found that all parts of the business transferred had to be taken into account in assessing the date of the transfer, even those located predominantly outside the UK (*Rajput v Commerzbank AG*).

Key practice point: The decision highlights two significant aspects of the way TUPE operates:

- The date of a transfer determines which employees transfer automatically under TUPE and which rights and liabilities transfer over with them. This decision confirms that, where a transaction takes place over a period of time, the transfer can take place prior to completion if responsibility for carrying on the business has moved from the transferor to the transferee – not necessarily easy for the parties to assess.

- The fact that the business has geographical locations outside the UK does not prevent TUPE applying to a transfer, provided the business is situated in the UK immediately before the transfer. Non-UK based elements of the business transferred should therefore be taken into account in assessing the date of the transfer.

Facts: The Equity, Markets and Commodities (EMC) division of the transferor bank had three components – Asset Management (AM), Exotics, Vanilla and Funds (EVF) and the Flow Trading Business (Flow). Flow accounted for about two fifths of the purchase price and was based mainly in Germany. The claimant, a senior compliance officer, provided services to all three components, although mostly to employees in London working in AM and EVF, who formed the majority of the London based employees. The Flow business had only five employees working out of London, but the claimant was employed to provide her services to them as well as to the other London based employees.

The transfer was effected in batches. 95% of the AM and EVF components had been transferred by the end of September 2019 but much of the Flow business did not transfer until much later – a significant proportion by March 2020 and the rest at the end of May 2020. The transferor dismissed the claimant on 31 March 2020 and she brought an unfair dismissal claim. It was accepted that there was a TUPE transfer and that the claimant was assigned to the EMC business. The date of transfer was significant for two reasons: the dismissal might not be effective if the transferor was not the employer at the time, and the claim, brought in June 2020, might have been out of time if the transfer had taken place more than three months earlier.

At a preliminary hearing, the Employment Tribunal decided that the transfer date was 1 October 2019, as nearly the whole of the EVF and AM components had transferred by that date. The Tribunal rejected the claimant's argument that the transfer date was 10 May 2020 - the date on which the transfer of Flow was completed – finding that Flow should not be the focus because it was not, apart from five employees, part of the London operation. The claimant appealed.

Decision: The EAT allowed the appeal. The EAT agreed with the Tribunal's reasoning on the principles of assessing the transfer date but found that it had wrongly disregarded the non-UK based elements of the business.

The EAT explained why it thought that the Tribunal had been correct to find that the date of the transfer was not the date of the last transaction in the series. The business purchase agreement (BPA) specified numerous transactions effecting the transfer, but the timing was deliberately flexible, reflecting various aspects for which the timescale was uncertain: regulatory approval had to be obtained, IT functions had to be in place and the transfer had to take place in batches, including the novation of numerous individual client investment contracts. No one could have said with authority, at the time the BPA was signed, what the single transfer date would be; it was a "wait and see" date.

The EAT confirmed that there is no rule that a transfer effected by a series of transactions occurs at the end of the series. Completion might be artificially delayed or the last transaction in the series might be a minor detail, putting the last piece of the jigsaw in place long after the transferee had started running the business to the exclusion of the transferor. For example, in this case, residual documents relating to the Flow business might be expected to remain in place for a year or more. The EAT added a warning that "*Ingenious devices to defeat employees' TUPE rights may lie in seeking to delay transfer or in seeking to accelerate it*".

However, the EAT went on to find that the Tribunal had been wrong to disregard the non-UK based elements of the EMC business. TUPE provides that it does not matter if the transfer, or employment of the employees, is governed by the law of a foreign state, or employees ordinarily work outside the UK. The business was "*situated immediately before the transfer in the United Kingdom*" under Regulation 3(1)(a) of TUPE, so the Tribunal should not have excluded from consideration a part on the basis that it was predominantly located outside the UK. The EAT added that, if the Tribunal had taken the Flow component into account, it would have been likely to have found that the transfer occurred later than 1 October 2019, so the case had to be sent back to another employment tribunal to decide the date of the transfer.

UNILATERAL IMPOSITION OF NEW CONTRACT COULD BE A DISMISSAL

Summary: The Employment Appeal Tribunal (EAT) held that an Employment Tribunal had applied the wrong test when deciding whether the unilateral imposition of a new contract amounted to a dismissal, which affected the employee's eligibility for an enhanced contractual redundancy payment. The Tribunal had to consider whether the employee's contract had been terminated and replaced by another, not whether the employee was entitled to resign and claim unfair dismissal (*Jackson v University Hospitals of North Midlands NHS Trust*).

Key practice point: Although the decision was focused on a technical issue – whether there had been a termination of contract - the case illustrates the potential consequences of amending terms by unilateral variation of contract. *Hogg v Dover College* established that an employee can be deemed to be dismissed if the contract under which they are employed is terminated by the employer unilaterally imposing a new contract. The effect of a "Hogg dismissal" is to enable an employee to bring a claim for unfair dismissal whilst continuing to work for the employer under new terms. In addition, as in this case, it can have consequences for contractual payments that depend on the employee being in employment on a particular date.

Facts: The claimant was a band 6 nurse with an entitlement to a contractual redundancy payment which was forfeited if she left employment before "expiry of notice". Following restructuring, the Trust attempted to give her a band 5 role on a new contract, with effect from 3 December 2018. She refused. The Trust accepted that she was dismissed for redundancy from her band 6 role and served notice. However, she resigned before the expiry of her eight-week notice period. The Employment Tribunal found that the new role had been imposed and upheld her claims for unfair dismissal and statutory redundancy payment but held that there had not been a "Hogg dismissal" on 3 December 2018 and therefore, as she had left before the notice period expired, she was not entitled to the contractual redundancy payment. The claimant appealed.

Decision: The EAT allowed the appeal and sent the case back to a different tribunal to determine whether there had been a Hogg dismissal. The Tribunal's analysis was flawed; in particular because it found that the imposition of the new contract involved "*no radical change such as to entitle the claimant to regard herself as constructively dismissed*" – this was the wrong test; a Hogg dismissal is an express not a constructive dismissal, so the Tribunal had to consider whether the contract of employment had been terminated and replaced by another. Likewise, the fact that the claimant had raised a grievance was not inconsistent with her employment having ended; the question was not whether employment in the broader sense had ended, but whether the old contract had been terminated. The Tribunal should have made a before-and-after comparison of the band 6 and band 5 posts to ascertain whether the new terms were of sufficient difference to amount to a withdrawal of one contract and its replacement by another.

SCOPE OF DUTY TO CONSULT EUROPEAN WORKS COUNCIL ON "TRANSNATIONAL" MATTERS

Summary: The Court of Appeal, overturning a decision of the Employment Appeal Tribunal, decided that where there are collective redundancies proposed in more than one country, the requirement in an European Works Council (EWC) agreement to inform and consult on "transnational" matters will not be triggered unless there is a common link between the proposals (*Olsten (UK) Holdings Ltd v Adecco Group EWC*).

Key practice point: The Court of Appeal's decision, that "transnational" matters requiring consultation with the EWC do not automatically include a scenario where two undertakings in different countries separately propose restructurings, is helpful. However, it is worth bearing in mind that if there is in fact a common link between the redundancies, the definition of "transnational" will be met.

Facts: Olsten was the UK representative of the Adecco Group (based in Switzerland). Under a clause in the EWC Agreement, Adecco was required to inform and consult the EWC, by calling an extraordinary general meeting on "transnational" matters, defined as matters concerning or having potential effects on at least two undertakings of the Group situated in two different EEA states. Following the redundancies and proposed redundancies in various countries in 2019/20, the EWC complained to the Central Arbitration Committee (CAC) about a breach of the clause. The CAC and subsequently the Employment Appeal Tribunal (EAT) held that proposed redundancies in Sweden and Germany had created an obligation to call an extraordinary meeting; there was no requirement that the proposed collective redundancies should share a common rationale. The EAT imposed a penalty of £20,000 for the failure to convene an extraordinary meeting. Olsten appealed.

Decision: The Court of Appeal allowed the appeal and set aside the EAT and CAC decisions, as well as the penalty notice. The Court decided that, although there was no requirement for a central management decision proposing both sets of redundancies, independent and unrelated employment events did not constitute a "transnational" matter triggering the extraordinary meeting. There had to be some "objective factual nexus" between the proposals. The EAT had been wrong to assume that two collective redundancies occurring in two countries at roughly the same time were connected; whether the two matters were connected or whether either one had actual or potential effects on Group employees in another

country was a question of fact. The case was sent back to the CAC to decide whether in fact there was a common link between the proposals.

REFUSAL OF SUITABLE ALTERNATIVE EMPLOYMENT ON REDUNDANCY WAS REASONABLE

Summary: The Employment Appeal Tribunal (EAT) confirmed that employees had not unreasonably refused offers of suitable employment and so were not excluded from entitlement to redundancy payments. It was sufficient that the employees' personal perception was that the new roles would be of reduced autonomy and status (*Mid and South Essex NHS Foundation Trust v Stevenson*).

Key practice point: A redundancy dismissal may be unfair if the employer fails to search for and, if it is available, offer suitable alternative employment within its organisation. Under Section 141 of the Employment Rights Act 1996, an employee who unreasonably refuses an offer of suitable alternative employment made by the employer will lose the right to a statutory redundancy payment. The first stage of this test (suitability) is objective and requires a comparison of the alternative employment with the former employment, but as illustrated by this decision, the second stage (whether the refusal is unreasonable) is very much subjective to the particular employee. The test will always be relevant to determining whether an employee is entitled to a statutory redundancy payment and may also be relevant to determining entitlement to a contractual redundancy payment if the contractual scheme imports the statutory test from Section 141.

Facts: The three claimants were each employed in roles described as "Head of Human Resources". Their roles became redundant because of a restructure. The claimants were offered but refused alternative employment in the role of "Senior HR Lead" and were dismissed as redundant. The Trust refused to make redundancy payments, contending that the claimants had unreasonably refused offers of suitable employment. The Employment Tribunal found that the Trust had offered suitable alternative employment but the claimants had acted reasonably in refusing the offer. The Trust appealed.

Decision: The EAT refused the appeal, rejecting the contention that, in considering the reasonableness of the refusal, the Tribunal should have taken into account its finding that the alternative employment was suitable. The EAT explained that, although the more suitable the offer, the easier it might be for the employer to show that the refusal of the offer was unreasonable, the test was not whether it was reasonable for the employer to offer the role, or reasonable for an employee to accept it, but whether *the particular employee* "unreasonably" refused the offer. The Tribunal had found that the claimants' personal perception was that there would be a loss of autonomy and status, in particular because they were to report to a Head of HR and were unconvinced about the credibility of their new role in the future Group structure.

Analysis/commentary: The EAT gave an example of another scenario where a refusal of a suitable offer might be reasonable. If an employer failed to engage with an employee and to explain properly the terms of an offer of an alternative role, then the fact that, on an objective analysis, the role was demonstrated to be suitable would have no bearing on whether the employee unreasonably refused the role - the refusal would be reasonable because the employee had been prevented from conducting that analysis when deciding whether to accept the role.

HORIZON SCANNING

What key developments in employment should be on your radar?

2023/24	• Regulations under the Protection from Redundancy (Pregnancy and Family Leave) Act 2023, to extend the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Strikes (Minimum Service Levels) Act 2023: minimum service levels on specified services • Proposed removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms • Workers (Predictable Terms and Conditions) Bill: right to request a more predictable working pattern
31 December 2023	Retained EU Law (Revocation and Reform) Act 2023: abolition of general principles of EU law and changes to UK courts' approach to retained EU case law ("assimilated case law")
April 2024	Carer's Leave Act 2023: entitlement to one week's unpaid leave per year for employees caring for a dependent with a long-term care expected to come into force
May 2024	Employment (Allocation of Tips) Act 2023 expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
July 2024	Employment Relations (Flexible Working) Act 2023 expected to come into force: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right
Autumn 2024	Worker Protection (Amendment of Equality Act 2010) Bill (to come into force one year after Royal Assent): duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Date uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • Proposed amendment of TUPE to allow small employers, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives • Proposed amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours, to allow the use of rolled-up holiday pay and to merge the basic and additional statutory annual leave into a single entitlement • Statutory Code of Practice on Dismissal and Re-engagement

- Economic Crime and Corporate Transparency Bill: failure to prevent fraud offence
- Changes to paternity leave to allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption

We are also expecting important case law developments in the following key areas during the coming months:

Employment status: *Griffiths v Institution of Mechanical Engineers* (EAT: whether a trustee of a professional body is a worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes); *Lutz v Ryanair DAC* (EAT: whether a pilot was a worker and an agency worker and not a self-employed contractor)

Discrimination / equal pay: *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees); *Element v Tesco Stores* (Court of Appeal: whether an evaluation exercise that had rated the claimants and their comparator jobs as equivalent amounted to a Job Evaluation Study for the purposes of an equal pay claim); *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *R (Palmer) v North Derbyshire Magistrates Court* (Supreme Court: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies)

Industrial action: *Mercer v Alternative Future Group Ltd* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action); *Independent Workers of GB v CAC* (Supreme Court: whether Court of Appeal was correct to find that Deliveroo riders did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they were not in an employment relationship)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown)

Working time: *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

CONTACT

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- PHILIPPA O'MALLEY
- PARTNER
- T: +44 (0)20 7090 3796
- E:Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- SENIOR COUNSEL
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650