SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

EMPLOYMENT LAW ASPECTS OF THE CHANCELLOR'S "MINI-BUDGET"

The Government's Growth Plan published on 23 September 2022, and the announcement of a separate Bill on EU law a day earlier, outline several proposed measures with significance for employment law:

- **Changes to EU-derived law:** The Government has published a far-reaching Bill, the Retained EU Law (Revocation and Reform) Bill 2022, which may lead to the abolition of some or all of "retained EU law": EU-derived legislation that was preserved in our domestic legislation at the end of the Brexit transition period. Retained EU law will expire on 31 December 2023, unless the Government legislates to retain and incorporate it into UK law. This could potentially affect legislation such as the Working Time Regulations, the Transfer of Undertakings (Protection of Employment) Regulations (TUPE), and Regulations protecting part-time, fixed-term and agency workers. The fate of the various pieces of legislation will not become clear for some time, as Government departments will now embark on a process of deciding which retained EU law can expire, and which needs to be preserved. The Bill will also provide domestic courts with greater discretion to depart from EU-derived case law.
- **Off-payroll working rules:** The Government has decided to repeal the 2017 and 2021 amendments to the IR35/personal service company tax rules. Amendments were made in 2017 (for public sector) and 2021 (private sector), so that contractors, who would have been employees if they provided their services directly to the client, pay broadly the same income tax and National Insurance Contributions (NICs) as employees. The end user (client) rather than the intermediary is currently responsible for determining whether the off-payroll rules apply. After the repeal of the rules in April 2023, responsibility for income tax and NICs will revert to the contractor.
- **Bankers' bonus cap:** The Chancellor has confirmed that the Prudential Regulation Authority will remove the cap on bankers' bonuses that was first introduced in 2014. Bonuses are capped at 100 per cent of salary (or 200 per cent with shareholder approval). The detail (and date) of the removal of the cap is not yet clear, but the change is likely to require employers in the financial services sector to review remuneration structures.
- **Industrial action:** As well as introducing minimum service levels on public transport, designed to minimise the disruption caused by industrial action, legislation will require "meaningful" pay offers from employers to be put to employees.

For more on other HR-related aspects of the Government's statement, please see our Briefing: The (not so) "mini-budget"?

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NO TUPE TRANSFER WHERE ACTIVITIES AFTER INSOURCING WERE NOT THE SAME

Summary: The Employment Appeal Tribunal (EAT) confirmed that a claimant's employment did not transfer by a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) when her employer stopped providing CCTV services to a Council. After the transfer of services back to the Council, existing Council staff carried out the CCTV work but in a considerably more limited fashion, because of staff availability. The activities carried out before and after the transfer were not fundamentally the same and there was therefore no service provision change (*Tuitt v London Borough of Richmond upon Thames*).

Key practice point: For there to be a "service provision change" under TUPE, the activities carried out after the transfer must be "fundamentally the same" as those carried out by the transferor. As indicated in previous cases, decisions in this area will always be dependent on the particular facts. However, the EAT has confirmed that the reasons behind a difference in activities are not relevant, unless they indicate deliberate engineering to avoid the consequences of TUPE. If the activity is fundamentally different, it does not matter whether that arose (as in this case) from staff availability or for other reasons.

Facts: The claimant was employed by Broadland as a CCTV operator. Broadland had provided CCTV operators to the Council to work alongside the Council's Careline staff in proactively monitoring screens, reporting to the police and responding to safety-related calls. After Broadland gave notice to the Council to end the contract, the Council decided, due to budgetary pressures, to stop employing full time CCTV operatives and monitoring of the cameras was undertaken by the Careline staff on duty in addition to their main Careline duties. The claimant brought an automatic unfair dismissal claim against the Council. However, the Employment Tribunal held that her employment did not transfer to the Council as a TUPE service provision change because the activities carried out after the transfer date were not "*fundamentally the same as the activities carried out by the person who had ceased to carry them out*", as required by Regulation 3(2A) of TUPE. The claimant appealed.

Decision: The appeal was dismissed; the question was one of fact and degree for the Tribunal and there was no error of law in its approach.

The EAT confirmed that focus is on the activity undertaken and whether and to what degree this has changed after the transfer. The Tribunal had concluded that the activities undertaken by the Council after the transfer date were fundamentally different to those previously carried out by Broadland. Broadland had provided a full-time CCTV operator between the hours of 6 pm and 6 am, whose entire role was to monitor the CCTV footage proactively and to respond to safety-related calls. By contrast, after the transfer date, any monitoring of the cameras was undertaken by staff as an addition to their main duties. The Tribunal found that these employees were already overloaded with duties for Careline and therefore the extent to which they were able to perform CCTV monitoring was minimal. In addition, the type of work had changed considerably; there was no proactive monitoring. The Council Careline staff were not performing the majority of the duties carried out by the transferor and, far from their duties being additional to the pre-transfer role, they were the main activity being undertaken.

The claimant had argued that the change in availability - the fact that before the transfer she was available to undertake the CCTV monitoring full time, whereas after the transfer the Careline staff only had limited availability to do so - was irrelevant if the activity was there to be done. The EAT rejected this; if the activity was fundamentally different the reasons behind the change were not relevant, unless they indicated a deliberate engineering to avoid the consequences of TUPE. There was no evidence of this; the decision not to employ full time CCTV operatives was driven by budgetary pressures.

RIGHT TO PARTICIPATE IN SHARE INCENTIVE PLAN TRANSFERRED UNDER TUPE

Summary: The Employment Appeal Tribunal (EAT) confirmed that an employee who transferred under 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. The employee had been a member of the transferor's plan under the terms of a Partnership Share Agreement and the obligations created by the plan arose "in connection with" the employee's contract of employment as required by TUPE (*Ponticelli UK Limited v Gallagher*).

Key practice point: The effect of Regulation 4(2) of TUPE is that the transferee effectively "stands in the shoes" of the transferor as regards the employees after the transfer. 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 with the transferor. The EAT has confirmed that TUPE can cover share scheme benefits even where the contractual documentation containing the right to participate is separate from the employment contract. This scenario ought to be picked up by due diligence inquiries on a sale.

Facts: G's contract of employment transferred to Ponticelli under TUPE on 1 May 2020. Prior to the transfer, he had been a member of a Share Incentive Plan (SIP) operated by the transferor, TEPUK, which he had joined in 2018 under a Partnership Share Agreement with TEPUK and the plan trustees. Participation in the plan was voluntary and it was not mentioned in G's contract of employment. The transferee refused to provide an equivalent scheme, and G sought a determination that he was entitled to be a member of a SIP equivalent to the TEPUK plan, his right to participate in an equivalent SIP having transferred under TUPE. The Employment Tribunal upheld his claims. The transferee appealed, contending that the obligations created when G joined the TEPUK plan did not arise either "under" or "in connection with" the contract of employment as required by TUPE.

Decision: The EAT refused the appeal. The Tribunal had been correct to hold that the mutual rights and obligations under the Partnership Share Agreement transferred. G's eligibility to join the TEPUK plan arose from his status as an employee of TEPUK. The TEPUK plan was directly connected to the way in which G was remunerated for his services as an employee. It also involved the provision to him of matching shares paid for entirely by his employer. It was part of G's broader financial package of benefits as an employee. In the circumstances, even if the obligations of TEPUK created by the Partnership Share Agreement did not arise "under" the contract of employment, they plainly arose "in connection with" that contract for the purposes of Regulation 4(2).

GOVERNMENT SUPPORT FOR BILL ON WORKPLACE HARASSMENT

The *Worker Protection (Amendment of Equality Act 2010) Bill* is a Private Members' Bill which, as drafted, extends the law on harassment in the workplace. The Bill appears to have Government support - the draft Explanatory Notes say that they have been prepared by the Government Equalities Office. The Bill contains the two measures proposed by the Government in its July 2021 response to consultation on sexual harassment in the workplace (see our Employment Bulletin September 2021):

- a duty on employers to take reasonable steps to prevent sexual harassment; and
- the re-introduction of third party harassment as a specific form of unlawful discrimination under the Equality Act 2010.

The main provisions of the Bill as drafted are:

- **Employers must take all reasonable steps to prevent sexual harassment of their employees in the course of their employment.** Employers are already potentially liable for discrimination (including sexual harassment) by employees in the course of their employment, unless the employer can show they have taken all reasonable steps to prevent it, but the Bill introduces a proactive duty to prevent sexual harassment. In the draft Explanatory Notes, the Government comments that the concept of "all reasonable steps" is well understood in the context of the statutory defence to discrimination and what constitutes it will depend on the specific circumstances of the employer, for example size and sector. In most cases, the employer's practices and procedures (such as grievance and reporting procedures) for preventing and dealing with sexual harassment are likely to be relevant. The Equality and Human Rights Commission (EHRC) will publish a statutory code of practice on workplace harassment, in time for the Bill's implementation. The EHRC published technical guidance in 2020 and described it as a draft version of the statutory code (for the key points, please see our Employment Bulletin February 2020). When it becomes a statutory code, tribunals will be obliged to take it into account.

  Under the Bill as drafted, standalone breaches of the employer duty can be enforced only by the EHRC; employment tribunals cannot consider individual claims for a breach of the employer duty other than in cases where a claim of sexual harassment has been upheld. Where a tribunal finds that there has been sexual harassment and that the employer duty to take all reasonable steps to prevent sexual harassment has been breached, it will be able to order an uplift to the compensation, up to a limit of 25% of the amount awarded for the sexual harassment claim.

- **Employer liability for harassment of employees by third parties.** This would apply to all forms of harassment, not just sexual harassment. An employer will be treated as harassing an employee in circumstances where an employee is harassed in the course of their employment by a third party (i.e. other than the employer or a fellow employee) and it is shown that the employer failed to take all reasonable steps to prevent that harassment.

Analysis/commentary: Even if the Bill does have Government support, it is likely to be some time before the new duty is in place. The Bill states that its provisions will come into force one year after the day on which the Act receives Royal Assent and the Bill is still in its early stages in Parliament. In the meantime, the EHRC's technical guidance provides suggested action points for employers. However, as last year's decision in *Allay (UK) Ltd v Gehlen* shows, even if the employer has taken some action, the reasonable steps defence may not succeed if there are further steps that the employer could reasonably have taken – in that case, to provide refresher equality and diversity training where this had become "stale and ineffective" (see our Employment Bulletin March 2021).

HORIZON SCANNING

What key developments in employment should be on your radar?

Summer 2022	Consultation on Statutory Code of Practice on "fire and rehire"
2022	Extension of ban on exclusivity clauses to lower paid workers
2022/23	Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill: duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Employment (Allocation of Tips) Bill: obligations on employers to deal with tips, gratuities and service charges • Neonatal Care (Leave and Pay) Bill
April 2023	Repeal of the off-payroll working rules in IR35
Date uncertain	Legislation expected to provide for: • Entitlement to one week's unpaid leave for employees who are carers • Extension of redundancy protections for mothers • Extension of permissible break in continuous service from one week to one month • Right to request a more predictable contract • Single enforcement body for employment rights

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 trustee of professional body is worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)
- **Employment contracts:** *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract; *Benyatov v Credit Suisse Securities (Europe) Ltd* (Court of Appeal: whether employer had duty of care to protect employee from criminal conviction)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Arvunescu v Quick Release Automotive Ltd* (Court of Appeal: whether claim for aiding discrimination caught by COT3 settlement agreement); *Secretary of State for Work & Pensions v Beattie* (EAT: whether the temporal limit on the pension exemption for age discrimination is unlawful)
- **Redundancies:** *R (Palmer) v North Derbyshire Magistrates Court* (Court of Appeal: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies)
- **Trade unions:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours); *Tyne and Wear Passenger Transport Executive v NURMT* (Court of Appeal: whether employer can claim rectification of a collective agreement)
- **Unfair dismissal:** *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Rodgers v Leeds Laser Cutting Ltd* (Court of Appeal: whether dismissal of an employee who had refused to return to work due to his concerns about exposure to COVID-19 was automatically unfair)
- **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)

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