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: move within west London was not substantial change or fundamental breach

A bus driver who was required to move to a new workplace 3.5 miles across west London following a TUPE transfer was not entitled to treat himself as dismissed. The change was neither "substantial", nor a fundamental breach of contract, according to a recent decision of the EAT (*Centinsoy v London United Busways Ltd*).

Change of workplace: C was employed as a bus driver, initially by CentreWest. His contract provided that the Westbourne Park depot in west London would be his primary place of work, although he could be required to work at any of CentreWest's other specified locations. In January 2010 CentreWest transferred the route 10 to LUB, and the drivers of that route (including C) transferred to LUB under TUPE. They were then required to work from LUB's depot in Stamford Brook, approximately 3.5 miles from Westbourne Park.

Dismissal under TUPE? C and the other drivers objected to this change and resigned, claiming that they should be treated as dismissed by LUB under Regulation 4(9) and/or 4(11) of TUPE. They relied on the similar case of *Abellio London Ltd and CentreWest London Buses Ltd v Musse* (see our Employment Bulletin dated 29th March 2012), where it was held that a move from Westbourne Park to Battersea did amount to a dismissal under both Regulations 4(9) and 4(11). Although it was common ground that the move to Stamford Brook was not within the mobility clause under C's contract, and was therefore a breach of contract, LUB argued that the breach was not fundamental or repudiatory. The Tribunal agreed, and dismissed C's claim.

No "substantial" change… The EAT dismissed C's appeal. It rejected a straight comparison with *Musse*, where the transfer was to a location south of the river, and some considerable distance (around 6 miles) away. Here, the EAT was satisfied that the change in location was not "substantial". Stamford Brook was in fact a more convenient location than could have been imposed on C under his contract, and involved no more than 60 minutes additional travelling time per day.

…and therefore no repudiatory breach: On the basis that the change was not "substantial", the claim under Regulation 4(9) had to fail (without the need to consider whether the change involved any "material detriment" to C). It also followed that the breach could not be fundamental or repudiatory, with the result that the claim under Regulation 4(11) also failed.

North-south divide: This case confirms that the north-south London divide is alive and well, even in TUPE cases. It seems that transferees should remain wary of requiring employees based in north London to move south of the river, but should have more freedom to move them within the same general area north of the river.

Constructive dismissal and monitoring private emails

An employee was not precluded from claiming constructive dismissal by his own prior repudiatory breach, where the employer (not knowing of its existence) had not acted on the prior breach. On the other hand, the employer's monitoring of private emails discovered in the course of a disciplinary investigation did not infringe the employee's right to privacy (*Atkinson v Community Gateway Association*).

Disciplinary investigation: A was employed by CGA, a housing association, as its Director of Resources. In late 2010 CGA discovered an overspend of £1.8 million, and began a disciplinary investigation into A's involvement.

Misconduct discovered in private emails: In the course of the investigation, CGA discovered that A had used CGA's email system to communicate with a woman (X) often during the working day, sending

emails which were not marked "personal/private" and which were of a highly personal and overtly sexual nature. This was in breach of CGA's email policy, which A had written and was responsible for enforcing. It also transpired that A had used his position to help X apply for a job at CGA, and had persuaded the interviewers to make her an offer (which they did, although X turned it down).

Employee claims constructive dismissal: CGA decided to add this new evidence to the disciplinary investigation, despite A's objection that the emails were private and should not have been accessed. The disciplinary hearing was convened but before a conclusion was reached, A submitted his resignation. He claimed constructive unfair dismissal based on alleged repudiatory breaches by CGA in accessing his personal emails.

Claims initially struck out: The Tribunal struck out A's claim as having no prospect of success, on the basis that A had committed fundamental breaches of his contract of employment (unknown to CGA until its investigation), and as a result, he was precluded from relying on any subsequent breach of contract by CGA in order to claim to have been constructively dismissed.

Constructive dismissal could occur despite earlier breach: The EAT allowed C's appeal. It found no clear English authority on the relevance of A's prior breach, but applying a recent Scottish case (*Aberdeen City Council v McNeill*), held that it did not provide an absolute bar to a subsequent constructive dismissal claim. It found that:

> "*If one party commits a fundamental or repudiatory breach…and the other does not accept that breach as bringing the contract to an end, whether because he does not know about the breach or otherwise, the contract continues…If the party which had the right to bring the contract to an end did not do so (whether or not he knew of that right) and was himself in fundamental breach of contract, simultaneously or subsequently, it would then be open to the originally offending party to accept that repudiation and bring the contract to an end.*"

The Tribunal had therefore been wrong to conclude that A was barred from claiming constructive dismissal. His claim was therefore remitted to a fresh tribunal for rehearing.

No breach of A's right to privacy: The EAT then decided that A had not suffered any breach of his right to privacy under Article 8 of the European Convention on Human Rights when CGA monitored his private emails and used them in the disciplinary proceedings. The EAT found no unjustified interference with A's Article 8 rights, as he had been acting in clear breach of CGA's email policy (which he had devised and enforced), and CGA had been legitimately investigating A's alleged misconduct.

No reasonable expectation of privacy: The EAT also concluded that A could have had no reasonable expectation of privacy in his emails. CGA's email policy made it clear that emails would be kept and searchable on its systems, and that employees should not assume their emails were private. Employees were encouraged to use other email accounts for personal emails wherever possible, and instructed to mark all personal emails sent on CGA's servers as "personal/private". The EAT noted that the emails between A and X had not been marked in this way. The emails also used "wingdings" (a font which renders letters as symbols) in an attempt to conceal their sexual nature; a move which the EAT took as evidencing A's knowledge that his emails might be read. The lack of any reasonable expectation of privacy was, the EAT held, determinative of any claim based on Article 8.

Lessons for employers: This case confirms that employers may face constructive dismissal claims from employees who have acted in prior repudiatory breach of contract. Although this may seem harsh on employers, as the EAT recognised, an employer facing a constructive unfair dismissal case in these circumstances would be able to argue for a reduction in compensation of up to 100% to reflect the fact

that if the employer had known of his prior breach, he would have been dismissed fairly in any event.

The decision also shows the importance of employers taking steps to negate any reasonable expectation of privacy in work emails. European case law has recognised that work emails could potentially attract an expectation of privacy, which needs to be countered by the clear wording of the policy (as happened in this case).

Trade union activities: how far are employees protected?

The EAT has given guidance on the proper approach to claims of detrimental treatment and unfair dismissal where the sole or main purpose is preventing or deterring an employee from taking part in trade union activities (*Serco Ltd v Dahou*).

Employee supports unrecognised union: D was employed by S as a team leader mechanic, working on S's contract for the "Boris Bike" cycle hire scheme. D was a member of the RMT union and was active on its behalf in seeking new members within S, with a view to the RMT being able to seek recognition from S.

Employer voices concerns: Discussions took place between S and D about D's trade union activities in the workplace during working hours. S was concerned given that the RMT was not a recognised union, and in light of its plans to call strike action during the London Olympics. D was told that if he persisted with his trade union activities in the workplace, he could face disciplinary action or dismissal.

Dismissal: D then had an aggressive altercation with a manager over allegations that he had continued these activities during a period of sick leave, This led to his suspension and a misconduct investigation which ultimately resulted in his dismissal for gross misconduct. D claimed that he had been subjected to detrimental treatment and automatically unfairly dismissed on grounds of his participation in trade union activities. The Tribunal upheld his claims, and S appealed.

What was the employer's purpose? The EAT allowed S's appeal. It noted that in this context it is for the employer to show the sole or main purpose for its actions. S claimed that it dismissed D because of his misconduct, rather than his trade union activities. However, even if the Tribunal was not persuaded that S had established this, it did not follow "as a matter of law or logic" that its main purpose was to prevent or deter D from participating in trade union activities. On the other hand, the EAT noted that even if D was in fact guilty of misconduct, this would not necessarily be determinative of the claim:

- If S was acting opportunistically in relying on D's misconduct (in circumstances where others would not have been similarly treated) it would be open to the Tribunal to conclude that despite the misconduct, S's true purpose in acting as it did was an improper purpose.

- On the other hand, it would not be enough for the Tribunal to find that the relevant decision-makers merely welcomed the opportunity to suspend and investigate D for misconduct because it objected to his trade union activities. In order for the claim to succeed, the Tribunal had to find that this was S's *main* purpose.

The case was remitted for re-hearing by a differently constituted tribunal.

Employer can control activities during work hours: It is worth noting that the protection for employees does not only apply to the activities of a *recognised* trade union; it can technically cover activities of an unrecognised union. However, it does require that the activities are undertaken "at an appropriate time", defined as either outside working hours, or inside working hours with the employer's consent. As S did not consent to D undertaking activities on behalf of the RMT (an unrecognised union) during working hours, there was also an issue as to whether D's activities were "at an appropriate time".

Points in practice

Zero-hours contracts: Consultation on anti-avoidance of exclusivity ban

The Government has published a further consultation on measures to prevent employers evading the forthcoming ban on exclusivity clauses in zero-hours contracts. This follows its previous zero-hours contracts consultation earlier this year, which resulted in clauses to enact the ban on exclusivity clauses being inserted into the Small Business, Enterprise and Employment Bill (see our Employment Bulletin dated 3rd July 2014).

The consultation seeks views on:

- the likelihood of employers avoiding a ban on exclusivity clauses, and how that might be achieved;
- whether the Government should do more to deal with potential avoidance, how might that be best achieved, and whether to do this alongside the ban or wait for evidence of whether such avoidance is taking place;
- whether anti-avoidance could be achieved by setting an hours / income / pay rate threshold, below which the ban on exclusivity clauses would bite;
- the possible consequences for an employer if they circumvent a ban on exclusivity clauses (including imposing financial penalties on employers, forcing employers to pay compensation to zero-hours workers, and granting zero-hours workers additional rights); and
- any potentially negative or unintended consequences of anti-avoidance measures (for example, creating inflexibilities for employers or discouraging them from creating jobs, by catching a wider group of contracts within the ban on exclusivity clauses).

The consultation closes on 3rd November 2014.

Bankers' bonus cap: ECJ trial date set

The UK's challenge to the CRD IV bonus cap has been listed for hearing before the ECJ on 8th September. The UK is arguing that the provisions of CRD IV which cap bonuses at 100% of salary (or 200% with shareholder approval) have no adequate legal basis in the EU Treaties, are disproportionate, and infringe the principles of legal certainty, subsidiarity and territoriality (to the extent that the cap applies to employees of institutions outside the EEA).

We will report further once the ECJ's judgment has been handed down.

EBT update

HMRC has made a number of recent announcements in relation to employee benefit trusts (EBTs):

- The EBT settlement opportunity is being withdrawn, and will only be available to employers who notify HMRC before 31st March 2015 that they wish to settle (with the actual settlement being agreed by 31st July 2015). The settlement opportunity is viewed as generous, as it allows payment of PAYE and NICs at the rates applicable at the time of contribution (rather than distribution), and allows a corporation tax deduction in most circumstances.
- In a linked development, the availability of the Lichtenstein Disclosure Facility (LDF) has been restricted, including so that it can no longer be used to disclose and settle EBT liabilities that HMRC are already looking into.
- Finally, HMRC has published amendments to the EBT section of its inheritance tax manual. These include new pages to explain the conditions for inheritance tax relief for transfers to an employee ownership trust, and updated guidance on the establishment of sub-trusts by deed, and new guidance about allocation of trust property otherwise than on sub-trusts.

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And finally…

Should holiday email be deleted?

It has been reported that German vehicle maker Daimler has introduced a new approach to holiday email. It has allowed its employees the option of having all their incoming emails automatically deleted when they are on holiday. The sender of any email during this period would receive an automated message informing them that the recipient is on holiday, their email has been deleted, and that they should either resend the email when the recipient returns from holiday, or contact a nominated replacement.

Daimler claims that the move is designed to improve work-life balance by allowing employees to enjoy their holidays without worrying about either checking emails while they are away, or returning to a huge inbox of unread emails. It claims that the response from senders has been "99% positive".

The new email policy follows similar moves by Volkswagen and Deutsche Telekom to stop email traffic during evenings, weekends and holidays. Earlier this year, new rules were introduced in France which require employees in the digital and consultancy sectors to switch off work phones and avoid looking at work emails after 6pm.

As many UK employees return to work from their summer holidays, many may be hoping that the UK could be next to take similar steps…

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