UK: Employment Update

This edition of Employment Update explores the new rights in relation to taking time off to attend antenatal appointments. We also consider recent case law on whether the Tribunal can hear employment claims brought by an employee of an American employer who spent 49% of his working time in the UK and whether the percentage of time an employee spends on activities determines whether he or she TUPE transfers in the event of a service provision change. Finally, we also examine a case which clarifies that an employee's undiscovered breach of contract is no defence to a claim of unfair dismissal.

Key issues

- Time off for antenatal appointments
- Employee's prior fundamental breach of contract is no defence to an unfair dismissal claim
- Jurisdiction: Tribunal refuses to hear claims of US employee on assignment to the UK
- TUPE transfer of employees is not determined by the percentage of time spent on transferring activities
- Equal pay audit orders: New Tribunal Powers come into effect

Antenatal leave

The Government is introducing a package of statutory measures that are aimed at encouraging shared parenting. The first of these measures comes into effect on 1 October with the introduction of the right for employees to take unpaid time off during working hours to accompany a pregnant woman to two antenatal appointments.

Q: Can any employee take time off?

A: This right will apply from day one of employment, however, in order to be able to take such time off, the employee has to be in a "qualifying relationship" with the pregnant woman and satisfy any declaration conditions. In addition, only antenatal appointments that have been made on the advice of registered medical practitioners, midwives or nurses qualify for the purposes of the right to take time off.

Q: What is a qualifying relationship?

A: An employee will be in a qualifying relationship if the employee:

- is the husband or civil partner of the pregnant woman;
- lives with the woman in an enduring family relationship but is not a relative of the woman;
- is the father of the expected child;
- is a parent of the expected child;
- is a potential applicant for a parental order in respect of a child to be born to a surrogate mother.

Q: What are declaration conditions?

A: The employer can, but need not, ask the employee to sign a declaration to confirm:

- that the employee has a qualifying relationship with a pregnant woman or her expected child;
- that the purpose in taking the time off is to accompany the woman to an antenatal appointment;
- that the antenatal appointment was made on the advice of a registered medical practitioner, midwife or nurse; and
- the date and time of the appointment.

Q: What sanctions apply if an employee is not permitted time off?

A: The maximum amount of time that may be taken to attend an ante-natal appointment is 6.5 hrs and the employee is not entitled to be paid in respect of such time off. However, if an Employment Tribunal considers that the employer has unreasonably refused the employee such time off, it must order the employer to pay compensation equal to the pay the employee would have received during the working hours during which he would have taken the antenatal leave.

The government has produced an employer's guide to this right, which may be found here.

Agency Workers

On 1 October 2014, a new right will also be introduced permitting an agency worker who has been on assignment for not less than 12 weeks to take paid time off during working hours to attend an antenatal appointment. This mirrors the current right of female employees to take paid time off to attend antenatal appointments. In both cases, there are no specific formalities that must be followed, although the employer, temporary work agency or hirer is entitled to ask for the following:

- a certificate confirming that the employee is pregnant, such as a MATB1 certificate; and
- evidence of the antenatal appointment, such as an appointment letter or other document.

An employer, temporary work agency or hirer can refuse an employee or agency worker time off to attend an antenatal appointment if it is reasonable to do so. If, however, a refusal is held to be unreasonable, then an Employment Tribunal may order compensation equivalent to twice the amount that she was entitled to receive when taking time off. The liability for any compensation will be divided between the hirer and agency according to what the Employment Tribunal considers is just and equitable based on their respective responsibility for the breach.

Shared Parental Leave Guidance

BIS has published a technical guide for employers on the new shared parental leave and pay regime that will apply in relation to employees whose baby is due on or after 5 April 2015 or who have a child placed with them for adoption on or after that date. This can be accessed here.

Jurisdiction: Tribunal refuses to hear claims of US employee on assignment to the UK

Given the increasingly global nature of the workplace, a not infrequent issue before the Tribunals is whether they have jurisdiction to hear claims brought by employees who work wholly or partly outside the UK.

In many of the cases in which the Employment Appeal Tribunal (EAT) has considered the territorial jurisdiction of employment tribunals, it has considered situations where the Claimant worked abroad but nevertheless wanted to invoke the protection of UK statutory employment rights.

Unusually in a recent case before the EAT the Claimant, F, spent a significant proportion of his working time in the UK before he was dismissed in circumstances that he asserted amounted to unfair dismissal and sexual orientation discrimination.

At first blush it might have been assumed that an employee who spent 49% of his working time in the UK and who was provided with living accommodation in London would have had the statutory employment protection to pursue unfair dismissal, whistleblowing and sexual orientation claims in the English employment tribunal. Not so according to the EAT and the employment tribunal.

The EAT reiterated that the task of the employment tribunal is to decide if Parliament could reasonably be said to have intended that the territorial scope of the unfair dismissal and/or discrimination legislation was intended to include the situation of the Claimant. Before that question could be answered, the Tribunal has to consider all of the circumstances of the individual including:

- The terms of the contract;
- The applicable law of the contract;
- The place of performance of the work; and
- The living arrangements of the employee.

According to the Tribunal's fact finding exercise, F was a US citizen employed by a US company and paid in US dollars. Although he travelled extensively for his work, he undertook an international assignment from a US base which involved him working in London for just under 50% of his working time and living in accommodation rented for him by the employer. F's bonus, holiday and time off were all provided in line with the employer's US policy and he paid tax and social security in the US. His contract provided for a relocation allowance to be paid and for the costs of two annual trips for F's partner to visit him in the UK.

F's international assignment was terminated by his employer whilst he was on a visit to the US. His employment, however, was not immediately terminated. This occurred shortly after a fruitless attempt to find alternative employment elsewhere within the employer's organisation.

The EAT also examined whether or not the termination of the international assignment in the US before the termination of the employment relationship itself was a sham, and concluded that it was not. In addition both the ET and EAT explored whether the arrangements described in the employment contract reflected the reality of the situation, or whether they had been overtaken by events. Both concluded that they did reflect the reality of what was happening in practice.

The EAT upheld the tribunal's decision that it had no jurisdiction to hear either the unfair dismissal, the whistle blowing dismissal or the sexual orientation discrimination claims. It agreed that it could not be said that F's employment relationship with his American employer was closely related to Great Britain and British employment law to give the tribunal territorial jurisdiction. F had not given up his US base even though he carried out some work in the UK and in other countries.

One point argued by F was that it could not be right for the tribunal to conclude that it had no jurisdiction to hear his sexual orientation discrimination claim under the Equality Act when it would have had jurisdiction under the predecessor legislation which provided protection to individuals who worked "wholly or partly" in Great Britain. This argument was rejected on the basis that if Parliament had intended the Equality Act to apply where an individual worked partly in Great Britain, it would have provided for that.

The decision in this case may seem surprising given that the Claimant worked for 49% of his time in Great Britain. It also seems surprising that the right to protection conferred by the Equality Act appears to be narrower than that conferred by its predecessor legislation, whereby individuals who work partly in Great Britain were entitled to statutory protection. What is clear, however, is that when a tribunal considers whether there is a close connection with British employment law it will consider each case on its own specific facts.

Factors that may be taken into account when assessing whether such a close connection exists include:

- The amount of time the employee spent working, training, visiting the UK;
- The nationality of employer;
- The governing law of the contract;
- Where tax and social security are paid;
- Who receives the benefit of the work;
- How the employee is described in any contractual or internal documents;
- Whether the contract reflects the reality of the working situation; and
- The location of the employee's base.

[Fuller v United Healthcare Services Inc]

Employee's prior fundamental breach of contract is no defence to an unfair dismissal claim

An employee may resign and claim constructive dismissal in circumstances where the employer's conduct is such that it amounts to a fundamental breach of contract. Constructive dismissal claims are frequently brought on the grounds that an employer has, without reasonable or proper cause, conducted itself in a way that is calculated or likely to breach the implied term of trust and confidence. However, breach of other contractual terms can also provide the platform for a claim of constructive dismissal.

In recent years there has been some legal debate about whether an employee can resign and claim constructive dismissal in circumstances where the employee's own conduct prior to the employer's conduct that is complained of, amounted to a fundamental breach of contract, albeit that the employer may not have been aware of it. This issue was considered by the EAT.

CGA commenced an investigation in relation to one of its senior employees, A, on his potential responsibility for a significant overspend. During the course of that investigation it became apparent to CGA that A had conducted himself in breach of its email policy by sending sexually explicit emails to a female friend. A had been responsible for producing the email policy and was accordingly aware of its provisions. In addition, CGA discovered that A had inappropriately attempted to help his female friend to apply for and obtain a vacant position with the company. These discoveries were added to the matters to be investigated for disciplinary purposes. This prompted A to resign with immediate effect on the grounds that the disciplinary proceedings were being conducted in such a way as to amount to a repudiatory breach of contract.

When defending the constructive dismissal proceedings, CGA argued that A's claim should be struck out because A could not accept the repudiatory breach of contract of his employer if he himself at that time was also in repudiatory breach, even though that repudiation had not been accepted by the employer. CGA's argument was that A had been in fundamental breach of his employment contract by using its email system in the way that he had, and because of the manner in which he had attempted to secure employment for his lady friend.

The Employment Tribunal accepted this argument and struck out the claim. However, the EAT overruled its decision. It held that where an employee has acted in repudiatory breach of contract but the employer has not accepted the repudiation, perhaps because it is unaware of the breach, that does not prevent the employee subsequently resigning on the grounds of the employer's later repudiatory breach of contract. The employee's earlier breach can, however, be fully taken into account at the remedy stage of the constructive unfair dismissal claim.

This case is a useful reminder that even where the evidence of the employee's gross misconduct appears to be overwhelming, taking shortcuts with the disciplinary process is inadvisable as it could provide grounds for

the employee to resign and claim constructive dismissal. Alternatively it is likely to render the dismissal unfair. In both cases, however, any contributory misconduct is likely to be reflected in any compensation awarded.

[Atkinson v Community Gateway Association]

TUPE: transfer of employees is not determined by the percentage of time spent on transferring activities.

When the Transfer of Undertakings (Protection of Employment) Regulations 2006 apply to a service provision change, the effect is to transfer the contracts of employment of employees who are assigned to the organised grouping of employees providing the services in question. Commonly this would arise in outsourcing situations where a client contracts with a third party to provide it with specific services that have previously been provided in-house or by another third party provider.

In order for there to be a service provision change transfer of an individual, a number of conditions must be satisfied including the following:

- There must be an organised grouping of employees based in Great Britain dedicated to the services being provided to the client; and
- The employee must be assigned to that grouping other than on a temporary basis.

The question of whether an employee is assigned to a dedicated group of employees has proved to be less than straightforward in some cases, particularly where an individual employee does not dedicate 100% of their time to the services being provided.

A recent EAT case has explored the approach that should be taken when assessing whether an individual is assigned to an organised grouping of employees and therefore transfers upon the change in service provider. In particular, the EAT considered whether the test was the percentage of time spent on the activities in question. Reviewing the relevant case law, the EAT extracted a number of principles:

- There must be an element of conscious organisation by the employer of its employees to carry out the activities in question; and
- There will not be an organised grouping of employees if the employees in question simply happen to be working on that particular activity at the time of the transfer, for example as a result of shift arrangements, even if at that time they happen to be spending 100% of their working time on the activities in question.

When assessing the question of a particular individual's assignment, the EAT held that while it is tempting to establish assignment by looking at the percentage of time the employee spends engaged in the activities in question, that is not the test that should be applied. It is essentially a question of fact to determine whether a specific individual is assigned and the tribunal can look at a number of factors including:

- The percentage of time spent on one part of the business or other;
- The amount of value given to each part by the employee;
- The terms of the contract; and
- How the cost to the employer of the employee's services have been allocated between the different parts of the business.

The EAT held that these are all relevant factors but the weight attributed to any one of them is a matter for the Employment Tribunal. Assignment is not a question that will be answered simply by reference to the percentage of time worked by the employee on a particular contract. The EAT considered that simply stating that an employee spent 100% of their time on the contract in question would not be sufficient; that could simply represent a snapshot of a particular moment in time and may not be indicative of an assignment to the organised group. Similarly the EAT considered that there could be cases where an employee will be found to

be assigned to the organised grouping of employees but in practice at a particular period spent less than 50% of their time on that work.

In the case in question, C initially spent 40% of his working time on the activities that were the subject of the service provision change; over time this increased to 67% of his working time. The EAT remitted the case to the tribunal to apply the correct approach to determining whether C had been assigned to the organised grouping of employees, but commented that it would not be perverse to find that he had been assigned on those facts.

This case illustrates that in the context of service provision changes it can still be a tricky issue to assess whether an individual is assigned to the organised grouping of employees who are performing the services where they are involved in other activities unrelated to the contract in question. Where a putative transferee wants to ensure the transfer of a key individual and there is doubt about whether they would transfer under TUPE, appropriate contractual safeguards should be taken.

[Costain Limited versus Armitage]

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New Tribunal Power to order Equal Pay Audits

A reminder that with effect from 1 October 2014 in cases where the Employment Tribunal upholds a complaint that there has been an equal pay breach, it must order the Respondent to carry out an equal pay audit subject to four limited exceptions. For these purposes, an equal pay breach covers both equal pay and sex discrimination claims in relation to pay under the Equality Act 2010.

The Government has now published the final form of regulations tidying up some drafting errors on the way. In summary, where a Tribunal exercises its new powers it will specify the (i) class of persons that the audit must cover; (ii) the timeframe the audit should cover; and (iii) the date by which the audit must be produced to the Tribunal. Breach of such an order can give rise to a penalty of £5000. In addition, the company will be required to publish the audit on its website subject to a narrow exception.

Full details of this new regime are set out in our July briefing which can be found here.