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UK: Employment Update

This edition of Employment Update considers the implications of two Supreme Court decisions for equal pay claims and the calculation of holiday pay and an EAT decision that highlights the need to ensure that compromise agreement wording does capture all potential claims and respondents. Developments in relation to promoting gender diversity in the workplace and TUPE service provision charges are also reviewed.

Equal pay claims: Supreme Court confirms litigation choice

The Supreme Court has ruled that an individual who wishes to pursue an equal pay claim has the option of bringing a claim in the Employment Tribunal in which case it must be lodged within six months of the claimant's last day of employment, or alternatively the individual has the option to bring the claim as a breach of contract claim in the High Court where the time limit for bringing such a claim is six years from the alleged breach of contract.

In many cases employees may not discover that they have legitimate equal pay claims for some time after their employment has ended or they have TUPE transferred to another employer, possibly as a consequence of learning of former colleagues' litigation. The Supreme Court's confirmation of the approach of the lower courts now crystallizes the possibility of significantly more equal pay claims being pursued in the High Court several years after employment has ended. Clearly the costs regime in the High Court will be less attractive to prospective claimants particularly as the Supreme Court indicated that in deciding what costs order to make the court must have regard to the conduct of the parties including whether the claim could reasonably have been presented in time to the Tribunal. Employers do, however, need to be alive to the risk of latent claims.

[Birmingham City Council v Abdulla]

Key issues

Gender diversity: New narrative reporting obligations

On the 18th of October the Government issued draft Regulations setting out the nature of a company's narrative reporting obligations. The draft Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 require quoted companies (that is companies incorporated in the UK and listed on certain UK, US or EU markets) to produce a strategic report. Amongst the items that must be addressed in the report is the number of men and women who are on the board, who are managers and elsewhere within the organisation. "Managers" for these purposes means a person who has responsibility for planning, directing or controlling the activities of the company and is an employee of the company.

Gender quotas on company boards: EU rethink

The European Commission has abandoned its proposal to impose a 40% female quota on listed company boards as a consequence of legal advice that it would be in contravention of EU law.

It is however likely to publish revised proposals later this year in which the 40% female board quota will be an aspirational target rather than a binding option.

Holiday pay: Pilots pay case has broader implications for holiday pay calculations

A decision of the Supreme Court in relation to the holiday pay payable to pilots may have broader implications for the calculation of holiday pay for normal workers in accordance with the Working Time Regulations 1998 (WTR).

The issue before the Supreme Court was how the holiday pay of airline pilots should be calculated. Were they only entitled to be paid basic pay during their annual leave or should other contractual payments be factored into the equation? The supplemental payments in question were a flight pay supplement and a base allowance. The pilots claimed that under the applicable legislation they were entitled to have both supplements factored into their holiday pay calculation.

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A number of questions were referred to the European Court of Justice (ECJ) in relation to holiday pay and its calculation under the Aviation Directive. The ECJ held that the provisions in the Aviation Directive were in line with the annual leave provisions in the Working Time Directive from which the Working Time Regulations (WTR) are derived. It considered that the Directive required the pilots to receive "normal remuneration" during statutory annual leave. By normal remuneration the ECJ meant remuneration linked intrinsically to the performance of the tasks that the worker is contractually required to perform (such as payments in respect of time spent flying) and these must be taken into account when calculating holiday pay.

The Supreme Court held that our domestic courts must therefore consider what amounts to 'normal remuneration' when calculating holiday pay. The case was returned to the Employment Tribunal to consider whether the flight pay supplement and the base allowance qualified as normal remuneration because they were payments linked to the performance of tasks that the pilots were contractually required to perform.

Although this case focussed on the Aviation Directive and its domestic implementation because the ECJ proceeded on the basis that the same principles apply in relation to the Aviation Directive and the Working Time Directive this may have implications for the calculation of a week's pay under the WTR.

At present the WTR provides that a week's pay should be calculated in accordance with various provisions in the Employment Rights Act (ERA). How a week's pay is calculated will depend on whether the employee has normal working hours, whether the remuneration varies according to time of work or whether the employee has no working hours. The way in which these provisions have been interpreted to date is such that compulsory but non-guaranteed overtime payments do not have to be taken into account when calculating a worker's pay. In light of the ECJ's ruling that normal remuneration should include all remuneration payable to the worker in order to place him in a position comparable to the remuneration received when the worker is working normally, it is questionable whether the WTR/ERA provisions in relation to a week's pay properly implement the Working Time Directive.

It remains to be seen whether workers will assert that commission payments, bonuses and other allowances should be incorporated into the formula for calculating their holiday pay on the grounds that such payments are normal remuneration linked to the performance of tasks they are contractually required to perform. In the private sector, an employee would have to persuade the Employment Tribunal to reinterpret the WTR and ERA and this may prove to be difficult. In the public sector,

however, employees will be able to rely directly on the Working Time Directive and argue that in accordance with the ECJ's ruling such payments should be factored into holiday pay.

[British Airways plc v Williams & Others]

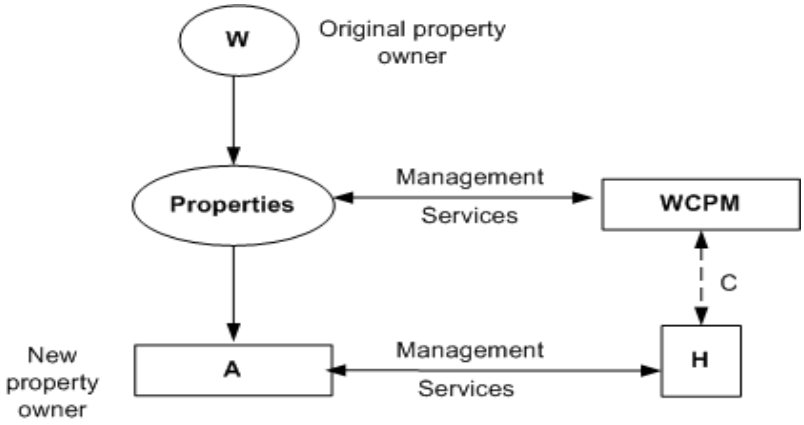
TUPE: Single client a pre-requisite for a service provision change transfer

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provide protection to employees in two scenarios: (1) when the employee is assigned to a business undertaking that transfers; (2) when a client contracts out a service (or brings it back in house or transfers the service from one service provider to another) and the employee is assigned to the organised grouping of employees that provide the services.

The Court of Appeal has clarified that a service provision transfer can only arise where it is the same client receiving the services. There is no need to 'stretch' the meaning of 'client' in order to achieve a transfer in as many situations as possible.

In the case in question C worked for WCPM which provided property management services to W. W defaulted on its mortgage so A, the mortgagee, assumed control of the properties. A then appointed H to provide management services for the properties. C was employed by H to provide the management services to the same properties (see the diagram below). The issue before the Tribunal was whether there had been a TUPE service provision transfer so that C's continuity of employment with WCPM was transferred when he started working for H, giving him enough service to bring an unfair dismissal claim against H.

The Court of Appeal held that in spite of the services having been provided in relation to the same property, A and W were different clients of the property management services; therefore there was no TUPE service provision transfer when C started working for H to provide the services to A.



This decision illustrates that where there is a change in property ownership, changes to security, maintenance and cleaning services in relation to the property may not give rise to a service provision transfer; much will depend on whether such services are provided to the new property owner before they are brought back in-house or a contract is awarded to a third party. If not then there will be no service provision TUPE transfer. It should be noted that the Court of Appeal did accept that there could nevertheless be a transfer of an undertaking depending on the precise factual scenario.

[McCarrick v Hunter]

Compromise agreements – wording not broad enough to cover all respondents

A recent EAT decision highlights the importance of ensuring that the wording of a compromise or COT3 agreement does in fact constitute a release from liability for the claims in question for all intended individual and corporate entities.

Discrimination claims under the Equality Act 2010 can give rise to joint and several liability between a corporate and an individual respondent. Similarly a claim under TUPE that there has been a failure to inform and consult will give rise to joint and several liability as between transferor and transferee. If active or prospective claims are settled and it is intended that the settlement covers all potential respondents the agreement must make that clear on the face of it, as should any correspondence with the Tribunal in relation to the withdrawal and (as appropriate) application to dismiss the claims.

In the case before the EAT, the claimants brought claims in relation to the failure to inform and consult under TUPE and unfair and wrongful dismissal arising out of an alleged service provision transfer from R to either ACT or Euro. They concluded a compromise agreement with R was in full and final settlement of the Tribunal proceedings against R. This was followed by a letter to the Tribunal applying for the claim against R to be dismissed. When the claimants subsequently continued with the claims against ACT and Euro, they challenged the claimants' ability to do so on the grounds that the compromise agreement barred them from proceeding.

The EAT held the claimants could continue with the claims; they were entitled to do so because it was clear from the compromise agreement wording that only the claims against R were being waived. Although ACT and/or Euro were potentially jointly and severally liable with R under TUPE in relation to the alleged failure to inform and consult; the compromise agreement waiver did not act as a release of ACT and Euro from liability. That would have to be made expressly clear if it had been the intention of the agreement.

When drafting a compromise agreement consider:

- What claims should be compromised?
- Who should receive the benefit of the waiver?
- Is there a mechanism to enable third parties to enforce provisions of the agreement (e.g. no bad mouth and waiver provisions)?

[Tamang & Anr v ACT Security Ltd & Anr]