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UK: Employment Update

This month's Employment Update examines an important ECJ decision on the effect of TUPE on terms and conditions derived from collective agreements. We also review (i) a key decision on the rights of sick leavers to carry holiday forward, (ii) recent case law on the level of unfair dismissal compensation for the loss of death in service benefits and (iii) whether an employer has a means of recovering business emails stored on an individual's personal computer.

TUPE: terms and conditions frozen at the point of transfer

Where there is a transfer of an undertaking or a service provision change to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply, the employees assigned to the undertaking, or to the organised grouping of employees providing the services, transfer on their existing terms and conditions of employment. In some areas of employment, particularly in the public sector, it is not unusual for individual employment contracts to provide that their terms and conditions (including the rate of pay) will be in accordance with the terms of relevant collective agreements negotiated from time to time with recognised trade unions.

Key issues

- TUPE: terms and conditions frozen at the point of transfer
- Holiday pay: sick leavers not entitled to carry forward additional holiday
- Unfair dismissal compensation: quantification of loss of death in service benefit
- Copies of business emails stored on a personal computer can be secured by court order

In the case in question, the employees of the London Borough of Lewisham had contracts which stated that their terms and conditions would be in accordance with the terms of the collective agreement negotiated from time to time with the local government collective bargaining body. The employees then TUPE transferred to P, a private sector employer. The issue that the Supreme Court had to consider was whether P was bound by the terms of the collective agreement negotiated after the employees transferred, even though P did not participate in the collective bargaining and would never be able to do so because it was a private body.

In essence, the issue was whether the terms of the collective agreement as incorporated into the employment contracts were static (i.e. P was only bound by the terms in existence at the date of the transfer to it) or "dynamic" (in the sense that subsequently negotiated terms would be incorporated into the employment contracts and would bind P even though P was not involved in those negotiations).

The ECJ, declining to follow the advocate general's opinion, held that the Acquired Rights Directive prevented Member State courts from giving a "dynamic" interpretation to clauses in the contracts of transferring employees if the transferee cannot participate in any negotiation process taking place after the transfer in question. In such cases, the transferred employees' contracts are not amended in accordance with the subsequent negotiations; the transferee simply inherits the employees on the terms and conditions as they existed at the point of transfer, i.e. they are frozen at that point in time and the transferee is not obliged to honour pay rises agreed in future collective agreements.

As a result of this decision, the Court of Appeal's decision that a "static interpretation" must be applied to the terms and conditions of employees transferring under TUPE will continue to apply.

The ECJ's decision is a victory for common sense and commercial reality and will come as a relief to private sector employers who no longer have to worry about being bound by the terms of contracts incorporating collective agreements that they are not party to and have no negotiating influence over.

[Alemo-Herron v Parkwood Leisure]

Holiday pay: sick leavers not entitled to carry forward additional holiday

Under the Working Time Regulations 1998 (WTR) workers are entitled to 5.6 weeks' paid leave per holiday year. This holiday entitlement is comprised of four weeks minimum leave (basic leave) plus an additional 1.6 weeks leave. This equates to 20 days basic leave and eight days additional leave for full time employees. The WTR provide that the basic holiday leave must be used in the holiday year to which it relates or it will be forfeit. A slightly different approach is adopted in relation to the additional holiday entitlement; the WTR permits any additional holiday to be carried forward into the subsequent holiday year where there is a relevant agreement to that effect. A relevant agreement includes, amongst other things, any agreement in writing between the worker and his employer (such as the contract of employment) and a collective agreement.

After years of some uncertainty a series of ECJ decisions clarified a number of issues arising in relation to the holiday entitlement of an employee who is absent on sick leave throughout an entire holiday year. In summary, the points emerging from the ECJ case law are as follows:

- An employee who is absent due to ill-health for an entire holiday year is entitled to take holiday during the ill-health absence should he or she wish;
- A worker on ill-health absence cannot, however, be made to take holiday during his ill-health absence;
- An employee unable to take holiday due to ill-health absence is entitled to carry holiday that has accrued during that absence forward into a subsequent holiday year;
- A worker who takes holiday during ill-health absence, or upon his return to the workplace, is entitled to be paid for that holiday at his normal rate of pay;
- Member states are entitled to limit the carry forward of holiday by sick leavers to the basic four week holiday entitlement arising under the Working Time Directive.

Although the WTR provide that the basic holiday entitlement will be forfeit unless it is taken in the holiday year to which it relates, Employment Tribunals have interpreted the legislation in such a way as to give effect to the ECJ decision that a worker should be entitled to carry forward holiday if they have been unable to take it due to ill-health absence. One issue that has not, however, been clarified as a matter of domestic case law is whether the entitlement to carry holiday forward also applies to the additional 1.6 week holiday entitlement.

This issue was considered by the Scottish EAT in relation to H who was off sick for part of the 2010 holiday year and during the 2011 holiday year until his resignation part way through that year. At the time of resignation he had taken 11 days holiday in 2010 but no holiday in 2011.

The WTR provide that a worker is entitled to be paid in lieu of untaken holiday on termination. Accordingly, if a sick leaver returns to work or simply resigns before returning to active work he is entitled to be paid in lieu of accrued but untaken holiday, including holiday that has been carried forward from subsequent holiday years. The issue before the EATS was whether the entitlement to be paid in lieu of accrued holiday applied to both the basic four week entitlement and the additional 1.6 week entitlement (i.e. eight days) or only to the basic four week entitlement?

H claimed accrued holiday for both holiday years; that is 17 days for 2010 (nine days basic holiday and eight days additional holiday) and 14 days pro rata for 2011.

The EATS held that H was only entitled to be paid in relation to the basic four week holiday that had accrued because there was no agreement between H and his employer that the additional eight day entitlement could be carried forward to subsequent years. Therefore payment in lieu of holiday for 2010 was limited to nine days as he had already taken 11 of the basic 20 day entitlement and he was not entitled to anything in relation to the additional eight days.

The Scottish EAT's decision is binding on Employment Tribunals in England and Wales. Accordingly, until such time as this decision is overturned (if at all) employers can differentiate between the basic four week annual leave entitlement and the additional 1.6 week entitlement when considering whether employees who have been unable to take holiday because of sick leave absence are entitled to carry the holiday forward and/or to be paid in lieu of such holiday entitlement.

Employers should however be careful not to follow this approach in relation to maternity leavers who have been unable to take additional holiday due to absence on maternity leave. Refusal to allow a maternity leaver to carry holiday forward into the holiday year in which she returns from maternity leave runs a high risk of a discrimination claim.

[Sood Enterprises Ltd v Healey]

Unfair dismissal compensation: Quantification of loss of death-in-service benefit

In circumstances where an Employment Tribunal holds that a Claimant has been unfairly dismissed, it may award such compensation as it considers just and equitable in all of the circumstances having regard to the loss sustained as a result of the dismissal as far as it is attributable to the employer's actions.

As part of their remuneration package many employees benefit from death-in-service benefit, which provides for the payment of a lump sum based on a multiplier of final pay, payable to a designated recipient on the employee's death. Can a Claimant recover compensation for loss of death-in-service benefits and, if so, how should that loss be quantified?

This was the question considered by the Court of Appeal on facts that were rather unusual. F was employed by BA for over 20 years. He had a period of ill health absence that exceeded six months and as a result he was given notice of dismissal for medical incapacity. Less than one month after F's termination date, he went into hospital for an operation and subsequently died. Under the terms of F's contract with BA, he was a member of its pension scheme and this provided death-in-service benefits which would have amounted to around £85,000.

F's father brought unfair dismissal proceedings in the Employment Tribunal, the principle purpose of which was to obtain compensation for the loss of F's death-in-service benefit.

The Court of Appeal rejected the contention that compensation could not be awarded for the loss of death-in-service benefit because it was payable to a third party. It held that compensation could be recovered and that in the unusual circumstances of the case, the compensation payable would be equal to the value of the death-in-service payment, that is, £85,000.

The Court of Appeal did emphasise that in ordinary cases, where an unfair dismissal claimant does not die shortly after dismissal, the amount of compensation to be awarded for loss of death-in-service benefit would be the cost of obtaining insurance that would provide an equivalent benefit.

Many employees will enjoy a range of non-cash benefits, such as private health insurance, permanent health insurance and so on. The loss of all of these benefits can be recovered by way of unfair dismissal compensation and the approach to the calculation of the loss would be similar. That is, the cost to the claimant of securing alternative insurance in the marketplace would be recoverable subject to the unfair dismissal cap (i.e. the lower of 12 months' pay or £74,200, unless the dismissal is claimed to be an act of discrimination or because the employee made a public interest disclosure).

[Fox v BA PLC]

Copies of business emails stored on a personal computer can be secured by court order

During the course of the modern business day, many employees send and receive electronic communications by means of their own personal computers and electronic devices. Where such emails are stored on the personal computer of a former employee, does the employer have the right to see and/or copy such emails? This was the issue considered by the Court of Appeal.

X was the former CEO of FHT. FHT wanted to retrieve and read numerous emails stored on X's personal computer as no copies of those business emails had been retained on its own servers.

The High Court rejected FHT's application to be provided with copies of the emails on the grounds that those emails were not FHT's property. When the Court of Appeal considered the issue, it held that it was unnecessary to explore the question of whether the information in the emails was the property of FHT.

The Court of Appeal considered that the CEO had acted as an agent for FHT when the emails were sent and received. The emails and their contents stored and held in X's personal computer should be treated as documents arising in the context of an agency relationship between X and FHT. A legal incident of the agency-principal relationship is that the principal is entitled to require production by the agent of documents relating to the affairs of the principal. The issue was not one of ownership of the email but simply a question of enforcement as between agent and principal of the rights and duties arising in the context of that agency-principal relationship. The Court therefore did have jurisdiction to make an order for the inspection and copying of the emails.

The facts of this case are perhaps a little unusual in that the employing entity had retained none of the emails on its own servers. Going forward, this decision provides employers with a platform for seeking inspection and copies of any business emails that may be held by current or former employees on their own personal electronic devices. In practice, it may also be prudent to include a provision in employment contracts requiring employees to provide copies of all business correspondence held on personal devices prior to their departure and make it clear in company policies that the employee is at all times acting as agent of the employer in all business communications, however they are transmitted.

[Fairstar Heavy Transport NV v Adkins and Another]

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