SLAUGHTER AND MAY

Employment Bulletin

September 2018

Welcome to the September edition of our Employment Bulletin. This month, our headline item is a European case illustrating that there can be a transfer of an undertaking despite a significant break in services. We also consider the definition of an agency worker for the purposes of protections under the Agency Workers Regulations. We look at recommendations from the Parliamentary Women and Equalities Committee for a new statutory duty on employers to protect workers from harassment and examine how an employer's refusal to postpone a disciplinary hearing made a dismissal unfair. We report on a failed application for an injunction to enforce restrictive covenants, before concluding with some horizon scanning.

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European Court finds transfer of undertaking can occur despite five month break in services

Summary: The European Court of Justice (CJEU) decided that there could be a transfer of an undertaking for the purposes of the European Acquired Rights Directive despite a five month break in services between the old and new service providers. The successful tenderer for a service contract for the management of a municipal school of music had ceased all activities two months before the end of the academic year, dismissing the staff and returning the material resources to the municipal administration. The administration conducted a new tendering procedure solely for the following academic year and provided the new contractor with the same resources (*Colino Sigüenza v Ayuntamiento de Valladolid*).

Key practice point: A break in activities, even if it is for a few months, will not necessarily mean that there cannot be a transfer of an undertaking on a change of provider.

Facts: CS worked as a music teacher at a municipal music school in Valladolid, Spain. From 1997 to 2013, the running of the school was outsourced by the municipal administration of Valladolid (AV) to a third party provider (M), a small private company set up expressly to tender for this contract (it did not have any other clients).

During the 2012/13 academic year, the relationship between M and AV soured, owing to a sharp decline in the number of pupils, which meant that the school was no longer profitable. In April 2013, M dismissed its entire staff and ceased all activities. It was subsequently wound up in July 2013, and AV terminated its contract.

Following a further tender process, a new contract to operate the music school was awarded to a new provider (IP). The new contract began in September 2013, when the school re-opened, using the same premises, instruments and resources, but with an entirely different staff.

CS and some of his colleagues brought unfair dismissal claims against M, AV and IP. These claims failed partly due to the finding that there had not been a transfer of an undertaking, because the activities were only resumed five months after the dismissals. The Spanish court referred the case to the CJEU.

Advocate-General Tanchev's preliminary Opinion was that there had been no transfer of an undertaking for the purposes of the European Acquired Rights Directive (the Directive). He found that there was no transfer of an "*economic entity which retains its identity*", given that M's existence entirely depended on the contract with AV, and when M ceased its operations and its last contract was terminated, there could no longer be any entity for the purposes of the Directive.

Decision: The CJEU did not follow the Advocate-General's Opinion on the question of whether there had been a transfer of an undertaking; it decided that the circumstances were capable of constituting a transfer.

It did not matter that neither significant assets nor a major part of the workforce had transferred from the old to the new contractor. VA owned and supplied the essential resources (such as instruments and premises) and made all the former contractor's resources available to the new contractor; and the business was not based essentially on manpower, so the fact that the new contractor did not take over the staff did not preclude there being a transfer.

The temporary suspension of activities did not necessarily mean that the economic entity had not retained its identity; case law established that it was just one factor to be taken into account. This was particularly relevant where, as here, although the activities ceased for five months, that period included three months of school holidays.

The CJEU sent the case back to the Spanish court to decide whether or not there was in fact a transfer of an undertaking within the Directive.

The CJEU did however confirm the Advocate-General's Opinion that the dismissal of the employees was made for "*economic, technical or organisational reasons entailing changes in the workforce*" (and not therefore void as having been caused by the transfer), provided that the circumstances which gave rise to the dismissals and the delayed appointment of a new service provider were not a deliberate measure

intended to deprive those employees of their rights under the Directive. Again, this was an issue for the Spanish court.

Analysis/commentary: As the UK business transfer regulations (TUPE) implement the Directive, and this is a pre-Brexit decision, the principles set out by the CJEU will apply to TUPE. The decision is not as helpful for clients seeking to avoid a TUPE transfer when they change service providers as might have been expected following the Opinion. It is unusual for the CJEU to be so at odds with the Advocate-General. However, the findings are clearly limited to similar factual scenarios involving service providers which are established purely for the purpose of delivering the particular contract and have no other clients.

Under UK law, there would be two possible ways of analysing a similar situation:

- Under the main provisions of TUPE – there have been cases where there has been a business transfer despite a temporary cessation in services. These were not situations where the business was closing down, however.

- Under the 'service provision change' (SPC) provisions in TUPE. For an SPC to occur, there needs to be an "*organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client*". This may not exist if the activities have ceased five months before the transfer. However, in *INEX Home Improvements Ltd v Hodgkins* (mentioned in our **Bulletin dated 15th October, 2015**) the EAT found that employees who had been temporarily laid off work immediately before an SPC could nevertheless be part of the organised grouping which transferred. The EAT pointed out that there is nothing in TUPE, or in any of the authorities, that requires the organised grouping of employees to be physically carrying out the activities at the relevant time in order for an SPC to occur. The purpose, nature and length of the cessation will be relevant in determining whether or not the organised grouping continued in existence.

Security guard on zero hours contract was agency worker

Summary: The EAT found that an Employment Tribunal had applied the correct legal test in deciding that a security guard supplied on a zero hours contract was an agency worker and entitled to protections under the Agency Workers Regulations 2010 (AWR). He was used as a 'cover' security guard rather than being assigned on an indefinite basis and was therefore temporary rather than permanent (*Brooknight Guarding Limited v Matei*).

Key practice point: The protections against discrimination under the AWR apply to those working "temporarily" for the hirer. This can include someone on a zero hours contract, if the evidence shows that the worker is being used by the hirer as cover rather than being assigned on an indefinite basis to carry out ongoing work.

Facts: The agency had employed the claimant, M, as a security guard on a zero hours contract for 21 months before dismissing him. M's contract included a flexibility clause enabling the agency to assign him to

different sites as required, although he was generally (although not exclusively) supplied to a hirer providing security services at a site in London.

The Employment Tribunal found that M was being used as a 'cover security guard' and was an agency worker for the purposes of the AWR. As he had 12 weeks' continuous service, the Tribunal held he was entitled under the AWR to the same basic working conditions as security officers employed directly by the hirer at the same site where he was working.

The agency appealed, contending that the Tribunal had wrongly treated the zero hours contract and M's relatively short period of service as determinative of the agency worker question.

Decision: The EAT dismissed the appeal, confirming the Tribunal's approach and its conclusion that M was an agency worker.

Under Regulation 3(1) of the AWR, to be an agency worker M had to

a) be supplied by a temporary work agency to work *temporarily* for, and under the supervision and direction of, a hirer; and

b) have a contract with the temporary work agency that was a contract of employment or any other contract to perform work or services personally. (This was satisfied by M having a zero hours contract.)

"Temporarily" is not defined in the AWR or in the European Directive they implement. However, *Moran v Ideal Cleaning Services Ltd* (where the EAT held that the AWR did not apply to cleaners who were assigned to one hire for periods of between six and 25 years), established a distinction between work which is temporary (within the scope of the AWR) and that which is permanent (outside the AWR). 'Permanent' in this context means that the work is open-ended in duration and 'temporary' means "*terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project*".

The EAT in this case said that although the focus has to be on the way in which the work was performed in fact, rather than on the provisions of the contract, the contract may be relevant as evidence as to what the parties understood and intended in terms of the work that the worker might carry out. Therefore, the Tribunal was entitled to take account of the complete flexibility afforded to the agency under their zero hours contracts, in particular, the ability to move security guards from job to job. These contractual terms were relevant factors because they reflected the reality of the relationship in practice.

However, the most significant part of the Tribunal's reasoning was based on its finding about the nature of the work done for clients such as the hirer. The Tribunal accepted M's evidence that, as a matter of practice, he worked as 'cover' rather than being assigned on an indefinite basis to carry out particular ongoing work. That finding was fatal to the agency's case. It was also corroborated by the hirer's characterisation of the services supplied by the agency as being on a "*required only basis*" and usually "*connected to additional cover that our customer base has requested*".

Analysis/commentary: The *Moran* decision in 2013 caused some uncertainty at the time over the AWR definition of an agency worker but this appears to be the first reported EAT case where *Moran* has been put forward as the main defence to the application of the AWR. The Government's non-statutory AWR guidance predates *Moran* and does not discuss the distinction between temporary and permanent,

merely listing as examples of characteristics of workers outside the AWR (permanent not temporary, in other words) as including where the contract is agreed between the worker and employer and is "*open ended or for a fixed period*".

Often of course, hirers and agencies will accept that the AWR apply. If not, there are a number of alternative approaches which may be considered.

As with other 'atypical' workers, the employment status and rights of agency workers is a fluid issue at the moment. We are waiting for the Government's response to its consultation on agency workers in the light of the Taylor Review (see our Bulletin dated 16th February 2018), including on the future of the 'Swedish derogation' (which provides an exemption from the right to equal pay where an agency worker is given a permanent contract of employment and is paid between assignments).

Parliamentary Committee calls for new duty on employers to protect workers from harassment

Summary: The House of Commons Women and Equalities Committee issued their Report on workplace sexual harassment on 25th July 2018. The Report's key recommendation is that there should be a mandatory duty on employers to protect workers from harassment and victimisation in the workplace, with substantial financial penalties for breach. The Committee wants protection under the new statutory duty to apply to everyone in the workplace, regardless of the type of contract they have, and including volunteers and interns.

Key practice point: The recommendations are not likely to become law in the near future but, given the Report's call for the Financial Conduct Authority and others to take a more proactive role in preventing harassment, employers in regulated sectors might expect to see developments in advance of legislation. Regulators are generally able to introduce new rules in a shorter timescale than the Government. In the meantime, employers should ensure their harassment policies are up to date and in force.

The Report recommends that the proposed new employer duty to protect workers from harassment should be backed up by a code of practice. The code would be statutory, so that failure to comply with it would then form part of the evidence used by an employment tribunal to determine whether the duty had been breached. Tribunals would also have discretion to apply an uplift to compensation of up to 25 per cent in harassment claims where there has been a breach of mandatory elements of the code.

The Committee emphasises that regulators (such as the Financial Conduct Authority) must take a more prominent role, by making it clear that sexual harassment is a breach of regulatory requirements by both the individual and their organisation and that breaches must be reported to the appropriate regulator. Perpetration of or failure to address sexual harassment in the workplace must be recognised as grounds for failing a 'fit and proper person' test or having professional credentials removed.

The Committee also calls for the reinstatement of the statutory duty on employers to protect workers from harassment by third parties. There were provisions to this effect in the Equality Act 2010 which were repealed in 2013. Employers were previously liable for the harassment of their employees by third parties, such as customers or visitors, if they failed to take "*such steps as would have been reasonably practicable to prevent the third party from doing so*"; and the employer knew that the employee had been harassed in

the course of their employment on at least two other occasions by (any) third party. The Committee suggests that the duty should be reinstated without the 'three strikes' condition.

The Report also makes a number of recommendations in relation to the use of non-disclosure agreements (NDAs), asking the Government to legislate to require the use of standard, approved confidentiality clauses, written in plain English wording. NDAs should be clear on the disclosures that are protected under whistleblowing laws (and cannot therefore be prohibited or restricted).

The Committee wants it to be a criminal offence for an employer or their professional adviser to propose a confidentiality clause designed to prevent or limit the making of a protected disclosure or disclosure of a criminal offence, and for it to be a professional disciplinary offence for lawyers advising on NDAs to use clauses that "*can reasonably be regarded as potentially unenforceable*".

The Committee also calls for changes to be made to employment tribunal procedure in sexual harassment claims, including:

- extending the time limit for lodging a claim to six months (as part of a wider review of the time limits in all discrimination cases);
- requiring employers to pay employees' costs if they have lost cases where there have been sexual harassment claims;
- giving claimants alleging sexual harassment that could constitute a sexual offence similar protections to those available in the criminal justice system; and
- re-introducing a version of the statutory questionnaire (which previously enabled employees to request information about a potential discrimination claim), specifically tailored for sexual harassment claims.

Analysis/commentary: The reports of Parliamentary Committees have become increasingly significant in the employment law field; a recent example is the report into workplace dress codes, which resulted in Government guidance just over a year later. In addition, whilst these proposals on sexual harassment are only recommendations, the Report is clear and it is likely that at least some of the proposals will be adopted.

If the Government were to introduce a duty to protect workers from harassment, would it be framed in terms of taking reasonable steps to prevent harassment? That does seem likely, given that the Committee said it supported the recommendation from the Equalities and Human Rights Commission (EHRC), in its report on sexual harassment earlier this year, for a duty "*to take reasonable steps to protect workers*".

Employers currently owe their workers a duty of care (including to protect them from workplace harassment), and an employer could potentially defend a claim for breach of that duty if it could show that it took steps to prevent the harassment from happening. However, the EHRC cannot currently take enforcement action for failure to take those preventative steps; a breach of a mandatory duty would enable it to do so.

Enforcement is a key theme in the Report; the Committee is clearly concerned about the effectiveness of the EHRC as a watchdog and has launched a review into its role in enforcing the Equality Act 2010 more generally. The Committee makes some interesting observations on how the anti-money laundering and (post-GDPR) data protection regimes are both supported by explicit obligations on organisations, with agencies able to issue unlimited fines, remove fit and proper status from an individual or cancel a business's registration, among other sanctions.

Refusal of request for postponement of disciplinary hearing made dismissal unfair

Summary: The EAT has confirmed that an employee was unfairly dismissed when her employer refused a request to postpone a disciplinary hearing for two weeks to enable a trade union official to accompany her at the hearing. The fact that the refusal of the postponement request did not breach the employee's right to be accompanied at disciplinary hearings, under Section 10 of the Employment Rights Act 1999, did not affect the unfairness of the decision (*Talon Engineering Limited v Smith*).

Key practice point: If an employee asks to postpone a disciplinary hearing because of the unavailability of a chosen companion, employers should try if at all possible to accommodate that request, even if it takes the hearing date beyond the five working days allowed for rescheduling by Section 10. Otherwise there is a risk that a subsequent dismissal will be unfair.

Facts: The claimant, S, had been employed from 1994 until she was summarily dismissed on 30 September 2016 for sending unprofessional emails to a contact in a company with whom the employer traded. The content of the various emails was said to have the potential to bring the company into disrepute and to breach the employer's bullying and harassment policy.

On 26 August, S was invited to a disciplinary hearing on 5 September 2016, which was postponed because of her sickness followed by a period of annual leave. On 19 September she was invited to a rescheduled disciplinary hearing ten days later on 29 September.

Throughout the disciplinary proceedings, S had intended to be represented by her trade union regional official. However, the union official emailed to explain that due to a conference in London he was unable to represent her during the week of 29 September. He offered his earliest availability, which was just under two weeks later on 10, 13 or 18 October.

The employer refused to postpone the rescheduled disciplinary hearing. They explained in an email to the trade union official that a further postponement would add strain to both S and the staff covering her work, making it a significant delay that they were not prepared to tolerate. In further correspondence the employer asserted they were entitled to reject the adjournment request because the union official could not attend within five days of the date set. (Under Section 10, where an employee's chosen companion is unavailable at the time proposed by the employer for the hearing, the employee has the right to suggest an alternative time not more than five working days later. If that time is reasonable the employer must rearrange the hearing for that time.)

S then wrote to the employer explaining that she was not prepared to attend in the absence of her chosen representative. The employer proceeded in her absence and decided to dismiss her summarily.

The Employment Tribunal found that the employer had a genuine belief in S's misconduct. However, although the employer had shown a potentially fair reason for dismissal under Section 98 of the Employment Rights Act 1996 (ERA 1996), the decision to dismiss was unfair procedurally and fatally flawed by the refusal of the employer to postpone the disciplinary hearing.

Decision: The EAT upheld the decision. The Tribunal had correctly applied Section 98 of the ERA 1996 in deciding that the dismissal was made unfair by the unreasonable refusal to adjourn the hearing for less than two weeks, particularly in light of S's unblemished career of 21 years.

The EAT explained that, whilst a breach of the Section 10 accompaniment right at a disciplinary meeting which results in the dismissal of an employee could well, and perhaps almost always will, lead to a finding of unfair dismissal for an eligible employee, the corollary cannot be right. The case was analogous to *Royal Surrey County NHS Foundation Trust v Drzymala* earlier this year where the EAT held that compliance with the non-discrimination regime in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 was not an answer to whether a dismissal by failing to renew a fixed-term contract was unfair.

Analysis/commentary: This case is a reminder that correctly following the provisions of the legislation and the ACAS Code on disciplinary proceedings is not in itself protection against a potential unfair dismissal finding. The right to be accompanied should always be approached with caution, even though it was established in *Toal v GB Oils Ltd* that compensation for breach of Section 10 itself may be nominal.

It is worth remembering too that an employee has an absolute right to choice of companion, as long as the companion is a trade union official or a fellow worker. This is the case even if the employer has reasonable grounds for believing that the companion is unsuitable (because their presence would prejudice the hearing, for example), unwilling or unavailable.

Injunction to enforce restrictive covenants refused because of lack of signed contract

Summary: The High Court refused to grant an employer an injunction to stop an alleged breach of restrictive covenants by a senior employee, because of the absence of a signed contract containing the restrictions, or of any evidence that there was consideration for the employee entering the contract (*Tenon FM Limited v Cawley*).

Key practice point: The lack of a signed contract is likely to be fatal to an employer's claim based on post-termination restrictions, unless there is other evidence of acceptance of the restrictive covenants.

Facts: The defendant, C, started to work for the employer, a large facilities management company, on 1 May 2008 and was promoted (and her salary increased) more than once thereafter. By the time of her resignation she was a member of the senior leadership team.

The contract which the employer said first governed her employment was dated 1 May 2008. That contract was unsigned by C and the employer was unable to locate a copy. The employer maintained that there were two further written contracts (2011 and 2012) which contained the restrictive covenants on which it was seeking to rely. Again, both contracts were unsigned. In her resignation letter of 3rd May 2018, C said "*As per the terms of my contract of employment I will continue to work for the company for the next three months, completing my employment on Friday 3 August 2018*". The employer contended that this was a

reference to the 2012 or 2011 contract. C said she gave three months' notice because she believed it was standard in the industry.

The employer became aware at the beginning of June 2018 that C may have been in breach of her obligations to them because she was already providing services to a competitor; she had solicited another senior employee to join them; and she had disclosed confidential information from a senior leadership team meeting in order to do this.

The employer applied for an interim injunction to enforce restrictive covenants which they claimed were part of C's employment contract and to prevent the other defendants from inducing her to work for them.

Decision: The High Court refused to grant the injunction. The employer's application was rejected because of the absence of a signed contract and of any evidence that there was any valuable consideration (let alone adequate consideration) for C entering the 2011/12 contracts containing more onerous restrictions than in the 2008 contract. The 2012 contract was attached to an email from the employer's HR manager and there was also a copy of an email from the manager to C asking her to sign, but no evidence of any response. The employer had apparently been unable to trace the manager to give evidence.

By contrast, C gave evidence that she had refused to sign more onerous contracts. Although the Judge noted that there were reasons to doubt C's credibility, nevertheless, her positive evidence that she had refused to sign was met only by inference that she was content to work on the basis of the 2011/2012 contracts.

Although acceptance can be inferred from conduct in continuing to work, as for example in *Wess v The Science Museum Group* in 2014 (where an employee had appealed one term in her newly presented contract but did not object to a new notice period), this did not apply here because the restrictive covenants did not, even potentially, have an immediate impact. They would come into effect, if at all, post-termination. *Solectron Scotland Ltd v Roper* in 2004 established that where an alleged variation does not require any response from the employee, the employee cannot be taken to have accepted it by conduct, particularly where it is an onerous term such as more severe restraint of trade.

There was also an issue as to whether the covenants were too wide. At least two of the senior leadership team did not have restrictive covenants in their contracts. Neither did two other senior employees with access to client contacts and confidential information. The absence of covenants in contracts of senior employees (in contrast to their presence in those of junior employees) was one of the reasons why the court in *CEF Holdings Ltd* refused to uphold restrictive covenants (see our Bulletin dated 5th July 2012).

Finally, as the granting of an injunction is discretionary, it was right to take into account the employer's conduct, for example, in serving proceedings on the eve of a family funeral, as well as the "completely disproportionate" costs incurred.

Analysis/commentary: There are some obvious warnings for employers here, about the difficulties in persuading a court to enforce covenants (even at an interim stage) in a contract the employee has not signed, as well as the need for evidence of consideration from the employee in return for agreeing new restrictive covenants (typically, after promotion). It was clear also that, in refusing the application, the Court took into account the employer's decision to issue proceedings without the usual pre-action

protocol (in particular, before considering the possibility of getting contractual undertakings from the employee).

The issue of the employee's implied acceptance of contractual changes was a finely balanced one which, at a full hearing, would no doubt have been considered in more detail. The onus on the employer is heavy; to show an unequivocal act implying acceptance, but *Solectron* makes it clear that the test is an objective one: is the employee's conduct by continuing to work "only referable" to the employee having accepted the new terms? In *FW Farnsworth Ltd v Lacy*, the employee's decision to apply for pension benefits under a new contract he had been given on promotion was taken as implied acceptance of new covenants in the (unsigned) contract (see our Bulletin dated 1 November 2012).

Horizon scanning

What key developments in employment should be on your radar?

4th October 2018	Childcare voucher scheme to close to new entrants
1st January 2019	Revised UK Corporate Governance Code due to take effect Associated legislation due to come into force – including to require listed companies to report annually the ratio of CEO pay to the average pay of their UK workforce
29th March 2019	European Union (Withdrawal) Act 2018 due to take full effect
4th April 2019	Gender pay gap reporting deadline
6th April 2019	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6th April 2019	Workers entitled to written statements of terms and itemised pay slips
April 2019	Annual updates to employment rates and limits
Mid to late 2019	Planned extension of the SMCR to all FSMA-authorised persons

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Uber v Aslam* (Court of Appeal)

- **Discrimination / equal pay**: *ASDA Stores v Brierley* and *Sainsbury's Supermarkets v Ahmed* (Court of Appeal: equal pay); *Lee v McArthur* (Supreme Court: sexual orientation v religious discrimination); *Hextall v Chief Constable of Leicestershire Police* (Court of Appeal: indirect discrimination and shared parental pay)

- **Holiday pay**: *The Sash Window Workshop td v King* (Court of Appeal: carry over of entitlement)

- **Whistleblowing**: *International Petroleum v Osipov* (Court of Appeal: liability of colleagues) *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure)

- **Data protection**: *Various claimants v WM Morrison Supermarkets PLC* (Court of Appeal: vicarious liability for rogue employee)

- **Trade unions**: *IWGB v UK* (ECtHR: challenge to recognition rules); *IWGB v CAC* (High Court: recognition by 'de facto' employer in outsourcing): *Kostal v Dunckley* (Court of Appeal: inducements); *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)

- **Collective consultation**: *Seahorse Maritime Ltd v Nautilus International* (Court of Appeal: territorial scope of employer's obligations)

- **Employer's liability**: *Bellman v Northampton Recruitment Limited* (Court of Appeal: vicarious liability for assault after Christmas party*); Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations).

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