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EMPLOYMENT LAW BULLETIN

DECEMBER 2017

Welcome to our December employment law bulletin.

We have some very interesting and important cases and developments to note this month.

In *King v Sash Window Workshop Ltd* and another the European Court has ruled that workers should be paid on termination for any accrued untaken leave (with no limit on carry over periods) where they have been disincentivised from taking leave because they would not have been paid for it. The case has enormous ramifications and will now return to the Court of Appeal for further clarification.

In R*awlinson v Brightside Group Ltd* the EAT has held that misleading an employee as to the real reason for dismissal was a breach of implied term of trust and confidence.

In *Guvera Limited v (1) Butler (2) Blinkbox Music Limited (in liquidation) (3) BB Music Holdings Limited (in administration)* the EAT examined a case where, following a share sale acquisition of the Company (which was not covered by TUPE), there was, thereafter, a TUPE transfer when the acquiring company took supreme control over the acquired company's day to day business.

In *Graysons Restaurants Limited v Jones* the EAT has held that equal pay claims are debts owed to employees for the purposes of reimbursement by the Secretary of State for the National Insurance Fund, upon the insolvency of their employer.

In *Baker v Abellio London Ltd* the EAT has overturned an employment tribunal decision that a dismissal was fair, where an employee had the right to work in the UK but had failed to produce the required documents. Although the employer in this case believed it was illegal to continue to employ the Claimant in these circumstances, this was not the case, and dismissal for illegality could not therefore be fair.

In S*ecuritas — Serviços e Tecnologia de Segurança SA v ICTS Portugal — Consultadoria de Aviação Comercial SA, Arthur George Resendes and Others* the European Court has considered the application of the rules under the EU Acquired Rights Directive to a situation where a client terminated a security contract and awarded it to a new provider, but where the new provider declined to take the old employer's employees.

Finally, may I remind you of our forthcoming events:

- **Annual TUPE Update**
  Breakfast Seminar, Leeds, 6th February 2018
  For more information or to book

In conjunction with ACAS

- **Understanding TUPE: A Practical Guide to Business Transfers and Outsourcing**
  A full day conference, Hull, 11th January 2018
  For more information or to book

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Wherever you see the BAILII logo simply click on it to view more detail about a case

New scheme for refunding employment tribunal and ET fees now in operation

Following the decision of the Supreme Court this Summer, those who have paid tribunal and EAT issue and hearing fees can now apply for a refund.

The scheme can be used both by claimants who paid the fees and employers who reimbursed the fees of a claimant by order of the tribunal.

Claims can be made through the link here.

ECJ rules workers with no paid holidays should receive pay in lieu of all untaken holiday on termination

In King v Sash Window Workshop Ltd and another, the European Court of Justice has ruled that workers should be paid on termination for any accrued untaken leave (with no limit on carry over periods) where they have been disincentivised from taking leave because they would not have been paid for it. The decision follows the opinion provided by Advocate General Tanchev which we covered in our June bulletin.

Under the UK Working Time Regulations (WTR), a worker can only bring a claim for holiday pay as a claim for unpaid wages after taking the leave. The Court of Appeal (following ECJ case law) held in NHS Leeds v Larner [2012] IRLR 825 that workers are entitled to carry forward leave from previous leave years when they have been unable or unwilling to take it because of sick leave. It also held that workers should be paid on termination for leave which has been carried forward in this way (that is because of sick leave.)

Mr King was a commission-only salesman for The Sash Window Workshop. During a period of 13 years he was not paid salary, holiday pay or sick pay. He was offered an employment contract which included paid holiday but he did not take up the offer. His contract was terminated when he turned 65. He brought claims for age discrimination and holiday pay. He argued that he had been discouraged from taking holiday because any leave taken was unpaid.

The employment tribunal found that he had been discriminated against on the ground of age. On the holiday pay claim, it found that Mr King was entitled to holiday pay for periods of annual leave which had been taken in the current and previous leave years (as a series of unlawful deductions from wages). It also found that Mr King was entitled to pay for accrued untaken holiday from the current leave year and from previous leave years.

The EAT did not agree on the basis that the tribunal had not established that Mr King had been prevented from taking annual leave by reasons beyond his control (as would be the case where a worker was unable to take holiday because he or she was on sick leave). On further appeal, the Court of Appeal referred a number of questions to the ECJ.

The ECJ held that a worker should not have to take unpaid leave before establishing an entitlement to be paid for that leave and that the WTR are incompatible with the European Working Time Directive by requiring a worker to take the leave before being able to claim the pay.

A worker who has not had the opportunity to take paid leave throughout his or her employment should be able to carry over the leave for the whole period of employment (until they have the opportunity to take paid leave). If employment ends before that opportunity arises, the worker should be paid for the accrued untaken leave on termination. The ECJ made clear that this is not the same as cases of long term sickness absence where limiting the period of carry over (for example to 18 months after the end of the relevant leave year) is reasonable to assist employers with the organisational difficulties presented by long term sickness. Employers who have not

afforded workers their proper right to paid leave should not have their interests protected in this way.

The Court of Appeal will now have to decide whether the WTR can be interpreted in line with this ECJ ruling. The decision relates only to the four weeks' minimum holiday under the Working Time Directive and not to the additional 1.6 weeks' under the WTR. It also deals only with payment for untaken leave on termination. However, this decision suggests that employers who have not made provision for paid holiday for workers and employees could face large payments for untaken leave on termination. The decision may throw into doubt whether the UK two year statutory back-stop on holiday pay claims is compatible with EU law.

Misleading an employee as to the real reason for dismissal was a breach of the implied term of trust and confidence

In Rawlinson v Brightside Group Ltd, the EAT held that an employee had been wrongfully dismissed when he was given a misleading reason for his dismissal.

Mr Rawlinson worked for an insurance broker, Brightside, as in-house legal counsel. His employer had concerns about his capability but these concerns were not raised with Mr Rawlinson. Brightside's CEO told Mr Rawlinson's line manager that his capability concerns had made Mr Rawlinson's position untenable. Rather than communicating this to the employee, it was decided to soften the blow by telling him his dismissal was due to a review of legal services. In this way, Mr Rawlinson would be expected to work his notice and complete a handover to his successor.

Mr Rawlinson was eventually informed of his dismissal and given three months' notice. He was told that the employer had decided to use more external legal advice. Mr Rawlinson argued that this would be a TUPE outsourcing transfer and that his employment should transfer but he received no information about who would be providing legal services in the future. He resigned with immediate effect and brought a claim for constructive wrongful dismissal in the employment tribunal (for his notice pay) on the basis that Brightside had, by failing to inform and consult him over a TUPE transfer, acted in a way which threatened to destroy or damage the mutual trust and confidence between employer and employee.

The employment tribunal dismissed his claim, deciding that Brightside was not obliged to give a reason for the termination and had not breached the implied term of mutual trust and confidence.

The EAT did not agree and substituted a finding of wrongful dismissal. It held that employers who mislead an employee about the reason for dismissal will, in all but the most unusual of cases, act in a way which threatens to damage or destroy mutual trust and confidence. It determined that Brightside's intentions in misleading Mr Rawlinson were mixed: to "soften the blow" and to keep the employment relationship alive for the handover period. However, in this case, the deceit was sufficient to be a fundamental breach of contract.

Where an employer has concerns about an employee's performance or capability, it may be tempting to invent a reason for dismissal to soften the blow. Misleading an employee about the real reason for dismissal is risky and can lead to claims. Employers should bear in mind that employees may eventually see documents which record the real reasons for dismissal, either through a data subject access request or when documents are disclosed as part of tribunal proceedings. This case also highlights that employees may be able to found a constructive dismissal claim on a breach of contract by the employer which they were not aware of at the time of the resignation.

Share sales and de facto TUPE transfers

It is common ground that a share sale acquisition is not covered by TUPE. TUPE requires a change of employer and upon the acquisition of the shares in a private limited company, there is no change in the identity of the employer, simply of the shareholders. The company remains the same. This was most recently confirmed by the High Court in the case of *ICAP Management Services Ltd v Berry* [2017] EWHC 1321.

However, in exceptional circumstances, where, following a share sale acquisition, the acquiring company assumes supreme control over the acquired company, a de facto TUPE transfer may occur. *The main authority for this is the decision in Millam v Print Factory (London) 1991 Limited [2007] ICR 1331. In Guvera Limited v (1) Butler (2) Blinkbox Music Limited (in liquidation) (3) BB Music Holdings Limited (in administration)* UKEAT/0256/16 Lavender J had the opportunity to consider these principles.

In this case, Blinkbox was a music streaming service. It was acquired by Tesco in 2012; but by January 2015 Tesco wanted to sell it. On 23rd January 2015 Guvera UK bought the shares in Blinkbox. This was orchestrated by a Mr Michael De Vere, a director of Guvera. Apparently this was without the authority of Guvera and its CEO and Chairman, Mr Herft.

In considering the facts, the employment tribunal divided events into three time periods.

> (1) From January until the end of April 2015, the business remained with Blinkbox. Mr De Vere became a Director, having been given 90 days by Mr Herft to turn the business around.
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> (2) From April to 11th May 2015. During this period Mr De Vere resigned as a Director of Blinkbox. Insolvency was a prospect for Blinkbox and Guvera was considering its options and was interested in acquiring Blinkbox's assets and about 20 employees. But the tribunal found that there was no transfer in this period as the business remained under the control of the Blinkbox Company.
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> (3) But on 12th May 2015, Mr King, Guvera's Chief Technical Officer, arrived at Blinkbox following Mr De Vere's departure and he continued there until Blinkbox went into administration on 11th June 2015. The tribunal found there was a transfer of an undertaking to Guvera at the start of this period because it assumed day to day control of the business in a way that went beyond the mere exercise of ordinary supervision or information gathering, between a parent and subsidiary.

Mr Herft, on behalf of Guvera, now took control of the Company and the tribunal found that he exercised influence over a number of key business decisions, redundancies were implemented and decisions were effectively now made by Guvera. According to the employment tribunal "standing back and looking at the bigger picture these features did, it seems to me, reflect the reality in which, from the start of the deferred period, Guvera did assume day to day control of the business of Blinkbox, crossing a line beyond the element of de facto control and information acquisition which comes with being a corporate parent in a way that amounted to taking over conduct of its day to day activities". Guvera was therefore held liable for claims made by employees who had been dismissed.

Guvera appealed. First, it appealed against the transfer of undertakings point. But the EAT considered that the employment tribunal had focused on the correct test. One of the factors relied upon by Guvera, was that it had not taken on the responsibility of an employer by paying employees' wages. The EAT found this argument unattractive. If the law was as Guvera intended, a company which took control of an undertaking, exercised the powers of an employer over the employees and in particular chose to make them redundant, could say that the Regulations did not apply to it because it did not pay the employees' wages due. This would be too easy a way around TUPE. The EAT has previously pointed out in *Housing Maintenance Solutions limited v McAteer* [2015] ICR 87 that it is undoubtedly one of the consequences of a transfer that the transferee assumes the obligation of an employer. One relevant factor in

deciding whether there has been a transfer may consist of action taken by a transferee, such as payment of wages. But the key test is whether there has been a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer vis-à-vis employees of an undertaking *(Landsorganisationen Denmark v Ny Mølle Kro* Case C-287/96 [1989] ICR 330).

Nor did the employment tribunal go wrong in pinpointing the date of the transfer itself. There was a clear finding of fact that the assumption of control by Guvera was on 12th May 2015 when Mr King, Guvera's Chief Technical Officer arrived at Blinkbox and took control of matters following Mr De Vere's departure.

TUPE: Insolvent transferors and a transferee's liability for equal pay claims

In *Graysons Restaurants Limited v Jones* UKEAT/0277/16 the facts were that Duchy Catering Limited went into administration. Administrators were appointed who sold its assets to Graysons Restaurants Limited. TUPE applied because case law has established that a transfer from a company in administration is a process which is not for the purpose of liquidating the assets of a company but rescuing its business *(see Key2Law (Surrey) LLP v De'Antiquis* [2012] ICR 881).

The general principle under TUPE is that a transferee is liable for all of the transferor's obligations including its debts owed to employees. However, since 2006, there has been a relaxation of this rule, by virtue of Regulation 8 (5) of TUPE, which prevents the operation of Regulation 4 (transfer of liabilities). Regulation 8 (5) stops the transfer of liability for unpaid sums to transferring employees, provided that the sums are reimbursable by the Secretary of State from the National Insurance Fund under the "relevant statutory schemes" (i.e. chapter VI of part XI of the ERA 1996 and XII of the ERA 1996 and the equivalent Northern Ireland legislation). Classic examples of these are unpaid wages and holiday pay within the statutory limit of 8 weeks of arrears. However, debts that fall outside the above category (e.g. debts that fall beyond 8 weeks of arrears) will still pass to the transferee.

In *Graysons* it was common ground that there was an equal pay claim, although the precise quantification of that equal pay claim had not yet occurred. The question was whether a claim for equal pay arrears is a claim for "arrears of pay" under the scheme of reimbursement (part XII or the ERA 1996) in circumstances where the claim has not yet been determined and whether it gives rise to a debt under the relevant provisions. In this case, an employment judge doubted that equal pay arrears are a debt payable at the time of the transfer and therefore reimbursable by the Secretary of State. The EAT disagreed. It held that equal pay arrears can be "arrears of pay" within the meaning of section 184 (1) of the ERA 1996 and therefore a debt within section 182 of the ERA. The employment judge was in error in concluding that arrears of pay arising from an equal pay claim that is yet undetermined cannot be a claim for "arrears of pay" within section 184 (1) of the ERA 1996.

The EAT's reasoning was that there is a presumption that equality clauses operated in the Claimant's employment contracts, since their work had been rated as equivalent to their comparators. If that presumption were not rebutted by a genuine material factor defence, the Claimants had a legal entitlement to be paid in accordance with the equality clauses for work they performed before the appropriate date. To the extent that they were not so paid, they were entitled to arrears of pay on the appropriate date. They were in no different position to suppliers of goods who were unpaid on the appropriate date, or employees who did not receive pay under implied or disputed oral agreements for work done for the appropriate date.

Therefore, liabilities for up to 8 weeks of arrears of equal pay do not transfer to the transferee in insolvency cases if they constitute sums payable under part XII of the ERA by the Secretary of State. But to the extent that the liabilities exceed the statutory limits in part XII of the ERA (i.e.

arrears beyond 8 weeks) liability transfers to the transferee.

Right to work checks and dismissal for illegality

In Baker v Abellio London Ltd, the EAT overturned a decision that a dismissal was fair where an employee had the right to work in the UK but had failed to produce right to work documents.

Mr Baker, a Jamaican national with the right to work in the UK, was a bus driver for Abellio. In 2015, Abellio undertook a right to work audit on all employees. Mr Baker could not produce the necessary documents and was suspended without pay.

The employer allowed Mr Baker time to produce the documents but he failed to do so and was dismissed for illegality despite the fact that Abellio had been informed by the Home Office that Mr Baker did have the right to work in the UK.

Mr Baker brought claims for unfair dismissal and unlawful deductions from wages (relating to the period of unpaid suspension) in an employment tribunal. The tribunal found that he had been fairly dismissed for illegality. In the alternative, it found that Mr Baker had been fairly dismissed for some other substantial reason (SOSR).

On appeal to the EAT, this decision on illegality was overturned and the case was remitted to the tribunal to consider whether the dismissal was fair for SOSR. Despite the fact that Mr Baker had withdrawn his unlawful deductions from wages claim, the EAT also remitted this claim back to the tribunal.

The EAT held that the potentially fair reason for dismissal could not be illegality as his employment was not in fact in contravention of any law. Abellio was not breaking the law which prohibits an employer employing someone who is subject to immigration control. Obtaining right to work check documents from an employee is not a legal requirement. Rather, carrying out a right to work check and obtaining the required documents provides a statutory excuse to the employer which protects them from receiving a fine where the person does not have the right to work. Although Abellio believed that it was illegal to continue to employ Mr Baker in these circumstances, this was not the case. The dismissal for illegality could not therefore be fair.

Employers can be placed in a difficult position when employees cannot produce the correct right to work documents. On the one hand, they must take into account the maximum fine of £20,000 which can be applied when an employer employs someone who does not have the right to work in the UK. On the other hand, they must consider the risks of a claim where the employee does in fact have the right to work. Employers may be best advised not to rely on illegality as the potentially fair reason for dismissal but to dismiss for some other substantial reason. They should also go through a fair dismissal process. Employers should note that they cannot rely on advice from the Home Office as to whether someone has the right to work in the UK. If Home Office advice proves later to be incorrect, the employer could still be subject to a fine unless the proper document checks have been carried out.

It was recently announced by the Insolvency Service that twenty directors have been disqualified for periods up to seven years for employing illegal workers following investigations into restaurant and takeaway businesses. Along with disqualification and fines, employers can also face criminal prosecution in these circumstances. Further information on this action is available here.

Service provision change and the European Court

In *Securitas — Serviços e Tecnologia de Segurança SA v ICTS Portugal — Consultadoria de Aviação Comercial SA, Arthur George Resendes and Others* (Case C-200/16) the European Court considered the application of the rules under the Acquired Rights Directive to a situation where a client terminated a security contract and awarded it to a new provider, but where the new provider declined to take on the old employer's employees.

In UK law, as we know, under Regulation 3(1)(b) of TUPE, a service provision change TUPE transfer occurs simply when activities previously carried out by one legal person are taken over and are carried out, instead, by a different legal person. Thus, in UK Law, provided that there is, before this change-over, an organised grouping of employees, the principal purpose of which is to carry out the activities concerned on behalf of the client, the mere loss of a contract and the taking over of that contract by a new contractor amounts to a transfer of an undertaking. This is irrespective of whether assets are transferred from the old employer to the new employer and irrespective of whether the new employer wishes to take on the old employer's workforce. Under European Law, it is different. Under the principle in *Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* (Case C-13/95), there will only be a transfer of an undertaking for the purposes of the Acquired Rights Directive if there is a transfer of significant tangible or intangible assets from the old employer to the new employer or, failing that, a voluntary taking over by the new employer of a major part of the workforce in terms of numbers and skills. If the service is asset reliant, whether there is a transfer, under European Law, will depend on whether the assets used by the old employer are transferred to the new employer. Conversely, if the service is labour intensive, whether there will be a transfer will depend, largely, on a transfer of a major part of the workforce in terms of numbers and skills.

In *Securitas* the facts were that ICTS was a contractor performing security guard services on behalf of its client, Portos Dos Açores (located in Ponta Delgada in Portugal). The security services required, were to look after the facilities in the port, including its dock and marina. The services included monitoring the entry and exit of persons and goods by means of radio surveillance devices. The security personnel employed by ICTS were also provided with uniforms and radio equipment. In January 2013 Portos Dos Açores decided to retender the security services and, in April, awarded the contract to Securitas in place of ICTS. The employees of ICTS were informed that they would be transferring to Securitas. A material fact was that one of the employees of ICTS surrendered the radio equipment used by ICTS in the port facilities having received instructions from ICTS to do so. Apparently Securitas then surrendered that equipment to the client. Securitas then began performing security guard services but it informed the ICTS employees, including Mr Resendes, that they were not required, and that they were still employees of ICTS. The employees brought an action before the local labour tribunal asking for clarification. The tribunal held there had been a transfer of a business between the two contractors and the employment contracts of the ICTS employees had been transferred to Securitas. Accordingly, they were successful in achieving a financial claim for their wrongful dismissal. Securitas appealed, first to the Court of Appeal in Lisbon and, secondly, to the Supreme Court in Portugal, which referred the issue of whether there had been a transfer to the European Court for an opinion.

Another issue for consideration is that the national collective agreement in the security industry purported to reject the idea of a transfer of an undertaking on the loss by a contractor of a contract in favour of a new contractor. Thus, clause 13(2) of the collective agreement, concluded by the Association of Private Security Undertakings, the National Association of Security Undertakings and various trade unions stated that: "the loss of a customer by an operator following the award of a service contract to another operator shall not fall within the concept of a transfer of an undertaking or business".

Was this provision in breach of European Law?

In considering the transfer of undertakings point, the Court confirmed that the directive does not rule out a transfer of an undertaking on a service provision change, since there need be no direct contractual relationship between a transferor and a transferee. But whether there is a transfer of an undertaking in all the circumstances depends on the usual factors relied upon by the Court and will depend on the type of undertaking or business concerned. Where, for example, the activity being carried out is essentially based on manpower, the identity of the economic entity cannot be retained if the majority of its employees are not taken over by the putative transferee. But where the activity is based essentially on equipment, the fact that former employees of the undertaking are not taken over by the new contractor (as was the case here) does not preclude a transfer of an undertaking where assets, or use of those assets, are transferred from the transferor to the transferee.

In this case, therefore, it would be for the national court in Portugal to determine whether ICTS did transfer to Securitas, directly or indirectly, equipment or tangible or intangible assets for the purposes of carrying out the security guard activities in question. If they did, and they were taken over, directly or indirectly by the new provider, a transfer of an undertaking would occur. The Court pointed out however, that it would only be the equipment that was actually used in order to provide the security guard services that would be relevant in this regard and that would exclude the facilities themselves that were the subject of the security services. In other words, if a new contractor comes in to replace a former contractor in a building, the fact that the contractor is now "using" and protecting the building will not be the deciding factor. It is a question of whether there is equipment necessary to carry out those security services which has been transferred from the former provider to the new provider. If therefore, in this case, the national court determined that equipment necessary to carry out security services was transferred directly or indirectly from the old provider to the new provider, a transfer of an undertaking would occur, irrespective of whether the staff were taken over.

On the question of whether the provision of the national collective agreement excluded such a possibility, the Court ruled that it could not. It is true that the mere loss by the contractor of a customer, to another customer did not of itself fall within the concept of a transfer of an undertaking. However, as the Court explained in this case, all of the facts characterising the transaction in question have to be taken into consideration, including whether the service is asset reliant. In such circumstances there could be a transfer of an undertaking on the loss of a contract. Therefore, the provision in the collective agreement which purported to exclude the transfer provisions in all cases of loss of a contract was not permissible and the terms of the directive could not be excluded by such a provision.

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