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1: ACAS responds to consultation on settlement agreements Code of Practice

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ACAS has published its response to the consultation on the draft Code of Practice on settlement agreements. This will provide guidance on the new provisions about confidential pre-termination negotiations. It is expected that the Code and the new statutory provision will be brought into effect in late summer.

Section 14 of the Enterprise and Regulatory Reform Act 2013 prevents “pre-termination negotiations” from being referred to in evidence in an unfair dismissal case. However, this will not apply if there has been “improper behaviour”. In that case, discussions will only be inadmissible in employment tribunal cases to the extent that the tribunal considers just. Finally, compromise agreements will be renamed “settlement agreements”. And there is to be a new statutory code of practice issued by ACAS and a non-statutory guidance on how to use the new provisions.

ACAS launched the public consultation on the draft statutory Code of Practice on 12 February 2013.

The changes to be made, following the consultation, are that:

- Initial settlement offers will not necessarily have to be made in writing.
- The recommended minimum period for consideration of a settlement offer has been increased from 7 calendar days to 10 calendar days.
- Templates have been removed from the Code. They will, instead, be included in the non-statutory guidance.
- The earlier suggestion that employees should always be allowed to be

accompanied at a settlement agreement discussion by a work colleague or trade union representative is no longer mandatory. It is now stated to be "good practice".

- The list of "improper behaviours" is now as follows:
  - all forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour;
  - physical assault or the threat of physical assault and other criminal behaviours;
  - all forms of victimisation;
  - discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnerships;
  - putting undue pressure on a party, for example:
    - not giving reasonable time for considering a settlement offer;
    - an employer saying, before any form of disciplinary process has begun, that, if the offer is rejected, then the employee will be dismissed; and
    - an employee threatening to undermine an organisation's public reputation if the organisation does not sign the agreement (unless the provisions of the Public Interest Disclosure Act 1998 apply).

2: Health and safety, strict liability and pregnant employees

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Much controversy surrounded the Government's proposal to introduce new regulations under Section 69 of the Enterprise and Regulatory Reform Act 2013 to provide that breach of statutory health and safety duties will not give rise to civil liability unless negligence is also shown. This would reverse the current "strict liability" approach to claims based on health and safety legislation.

However, the Health and Safety Executive is now consulting over a proposal that these new regulations would not affect the current position in relation to pregnant women and new mothers. This is because of the requirements of the EU Pregnant Workers Directive. Subject to consultation, it is suggested that strict liability would therefore remain the rule in such cases.

3: UNISON to challenge Employment Tribunal fees

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It has been widely reported that the trade union UNISON is to challenge the decision by the Ministry of Justice to bring in fees for claims in the employment tribunals and

Employment Appeal Tribunal on 29 July 2013. UNISON is applying to the High Court for judicial review of the decision to introduce fees. According to the union's website summary the union wrote to the Ministry of Justice on 1 June 2013 warning it that if the legislation were not revoked, the union would lodge judicial review proceedings. In brief, the legal arguments are going to be as follows:

- In accordance with the EU law, national courts must not make it virtually impossible, or excessively difficult, to exercise individual rights conferred by European Community Law. The new fee regime will impose fees which will often be greater than the expected compensation, even if such claims were successful. They are therefore set at a level which is prohibitive, even to those entitled to partial remissions. Reasonable people, it is said, will not litigate to vindicate their EU rights in such circumstances.
- Fees are not payable at all in most claims brought to the First-Tier Tribunal, a similar tribunal at the equivalent level in the judicial hierarchy to the employment tribunals. It is a breach of the principle of equivalence to require significant fees to be paid to vindicate EU rights where no fees are payable to vindicate similar rights derived from domestic law.
- There has been no proper assessment of the Public Sector Equality Duty. An assessment should have been made of the potential adverse effects of introducing fees in terms of the numbers and proportions of claims brought by individuals with protected characteristics which would previously have been brought and which will now not be pursued.
- Charging relatively high fees to pursue claims will have a disproportionate impact on women and therefore amount to unjustifiable indirect discrimination.

4: Information and Consultation and the Woolworths insolvency

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Does a single site, or store, amount to an establishment, or should it be looked at across the organisation as a whole?

Under Article 1(1)(a) of the European Collective Redundancies Directive (Directive 98/59/EC) member states can choose from one of two definitions of "collective redundancy":

1. The dismissal, over a period of 30 days, of at least:
    1. 10 workers in an establishment with 21-99 workers;
    2. 10% of the workforce in an establishment with 100-299 workers; or
    3. 30 workers in an establishment of 300 or more.

(Article 1(1)(a)(i)).

2. The dismissal, over a period of 90 days, of at least 20 workers, whatever the number of workers normally employed in the establishment in question (Article 1(1)(a)(ii)).

The Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA), implements Directive 98/59/EC. Section 188 (1) TULCRA obliges employers to collectively consult where they propose to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Where an employer fails to comply with this collective consultation duty, an employment tribunal can make a protective award of up to 90 days' actual gross pay for each dismissed employee.

In a press release issued on 31 May 2013, the law firm Slater and Gordon reported that the EAT has overturned the employment tribunal's decision in USDAW and others v WW Realisation 1 Ltd (in Liquidation) on the meaning of "establishment" in the collective redundancy legislation. The issue of consultation was addressed in respect of employees made redundant in 2008 when Woolworths went into administration. Although the tribunal found that there was not adequate redundancy consultation, it found that each store was a separate establishment for this purpose and therefore employees in stores with fewer than 20 employees did not get a protective award.

According to the press release, the EAT:

"ruled that the words 'at one establishment' are here and after to be regarded for the purposes of any collective redundancy involving more than 20 employees, as meaning that once it is proposed that more than 20 employees in a single business are to be made redundant, their location becomes irrelevant".

(Emphasis added)

This case may yet go to appeal but, as it stands, it will bring about a significant change to the law in this area. Employers will need to be aware of when the obligation to consult collectively will arise and they will be best advised to collectively consult whenever 20 proposed redundancy dismissals are being considered, regardless of where those dismissals are to take place.

More information will be available once a full update of the case has been published.

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5: The covert video surveillance of an employee whilst committing misconduct did not make a dismissal unfair

In City and County of Swansea v Gayle an employee was dismissed for gross misconduct discovered partly by the use of covert surveillance.

Gayle had been spotted sometime between 3.30pm and 5pm by a senior employee at a local sports centre playing squash when he should have been at work. On investigation it appeared that he had not clocked off that day until 5.43pm. On a subsequent occasion he was again seen at the local sports centre at 4.55pm. This time he sent a work message at 5.10pm to his employer telling his employer that he was at work and just finishing, and that he had rung the office, but there had been no answer.

The Council decided to arrange covert surveillance through a private investigator with a video camera. On five subsequent Thursdays video footage was taken showing the Claimant at the sports centre at times when he should have been at work. He had not clocked off and therefore he was playing sport during the time that his employer paid him

to work. The employment tribunal had no difficulty in finding that misconduct had occurred. The issue was about the investigation that the employer undertook. It thought the Council had gone too far. It thought that the Council had all the evidence it needed that the employee was being untruthful about his whereabouts during work time. It thought that the process the Council used involved an "unjustified interference" with the employee's rights under Article 8 of the European Convention on Human Rights (right to respect for private and family life). Additionally, the tribunal considered that the Council had ignored its obligations under the Data Protection Act 1998 as clarified by the Data of Protection Employment Practices Code. The Employment Practices Code, for example, sets out as important measures such as carrying out an impact assessment and the Council had in the Tribunal's opinion, observed My Gayle at a place where he had "a legitimate expectation of privacy".

The Employment Tribunal therefore found that the dismissal was unfair. But, it awarded him no compensation on ground of contributory fault.

The EAT reversed the finding of the employment tribunal as to liability. First Article 8 was not engaged. Mr Gayle was filmed outside the sports centre. Taking photographs of people in public places will not generally constitute a breach of Article 8, because such individuals will not have a reasonable expectation of privacy in those places. Mr Gayle was in his employers' time when he was filmed. An employer is entitled to know where someone is and what he or she is doing during working hours. Mr Gayle was also a wrongdoer. A person in such circumstances can have no reasonable expectation of privacy.

Finally, the tribunal had overstated the affect of the Employment Practices Code. It is guidance with no statutory force. The employment tribunal had been influenced by its distaste of the use of covert surveillance to find out the facts. The correct approach was to ask whether the employer's actions in treating the reason, here misconduct by taking time off from work during the working day and claiming pay for it, was a sufficient reason for dismissing. There is no separate freestanding right to hold a dismissal unfair because an employment tribunal has a criticism of the way in which or distaste for the way in which an employer has behaved. In the words of the EAT "however reprehensible an employer's behaviour may be, in moral or social terms, it is only the extent to which that impacts on the fairness of the dismissal which is relevant to the tribunal's decision". In this particular case, the tribunal, in criticising the employer for covertly filming the employee, was not dealing with any matter relevant to the fairness of the dismissal, the reason for which had been established.

6: Technical breaches of TUPE information and consultation obligations: the EAT lays down the correct approach

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In Shields Automotive Ltd v (1) Langdon (2) Brolly the EAT considered that all too common situation where the sale of a business requires information and consultation with employee representatives under TUPE, but the employer does not get round to it until the last minute.

Shields was a Toyota dealer engaged in the sale of motor vehicles. The dealership and franchise were transferred to Arnold Clark Automobiles Limited on 10 August 2011. A number of employees were affected by the TUPE transfer.

Although the transfer was very much on the cards as early as March 2010, it was only at 2pm on 2 August 2011 that the employees were told by management about the transfer and invited to elect employee representatives (for there was no trade union involved) as provided for by Regulation 13(3)(b)(1) and Regulation 14 of TUPE. The election was called at 2pm, with voting to be completed by 5pm in circumstances where the employer knew that a relevant employee would be absent until the next day and could not show any good reason why it could not have waited for him to return.

One employee was clearly elected but there was a tie for the next of the two posts. Rather than telling any of the employees or candidates about this, the manager simply chose one of them. Mr Langdon, one of the Claimants, complained about the short timescale and had chosen not to exercise his right to vote. The other Claimant, Mr Brolly, was the person who was not at work because it was his day off and was given no alternative opportunity to vote.

The employment tribunal held that the employer had breached Regulation 13 of TUPE in first, failing to allow enough time for the return of votes to give everybody the opportunity to cast their vote for an elective representative, and, secondly, because the employer itself determined who should be the elected representative when there was a tie, without informing the affected employees, either of the tie, or how the employee representative had been chosen.

The tribunal awarded seven weeks pay to Mr Brolly and two weeks pay to Mr Langdon. The employer appealed. The EAT noted that in accordance with the Court of Appeal decision in Susie Radin Ltd v GMB and Others [2004] IRLR 400 the purpose of a protective award is to punish the employer and regard must be had to the maximum award of thirteen weeks' pay in the first instance, allowing the employer to argue this down. But the EAT considered that in all the circumstances the breach was technical. It was not a case were no information or consultation had taken place at all and therefore, in the circumstances, Mr Brolly's award should be reduced by three weeks.

This case illustrates two things. First, the information and consultation obligations must be followed in every business transfer, however few employees are involved and whether or not a trade union is recognised. Secondly, employees must always be invited to elect employee representatives through a proper election process carried out over sufficient time. On the other hand, mere technical breaches may not attract the maximum thirteen weeks' pay award.

7: Did a former employee transfer under TUPE if, at the time of transfer, an appeal against her prior dismissal was pending?

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No, says the EAT, on the facts in Bangura v Southern Cross Healthcare.

The employee worked in a care home owned by Southern Cross Healthcare Group Plc. She was summarily dismissed on ground of misconduct about six weeks before the care home was transferred to Four Seasons Healthcare. At the time of transfer she had an appeal pending against her dismissal, but it had not by then (or at any time since then) been determined by Southern Cross.

An employment tribunal held that the TUPE Regulations did not transfer liability to Four

Seasons since the employee was not employed by the transferor immediately before the transfer, as is required by Regulation 4(3) of TUPE.

She appealed on the ground that this seemed inconsistent with the earlier decision of the EAT in G4S Justice Services (UK) Limited v Anstey [2006] IRLR 588. In that case an employee in a similar situation, whose appeal against dismissal was successful, transferred to the transferee under TUPE on the basis that the original dismissal, by virtue of the successful appeal, had been overturned.

However, in Bangura, the EAT distinguished Anstey. In Anstey the appeal had been successful and the dismissal negatived. In the absence of a successful appeal, the normal principle applies, namely that a summary dismissal takes effect immediately and terminates the employment at that time. As the dismissal had nothing to do with the transfer, the employee was therefore not employed or deemed to be employed in the undertaking immediately before its transfer.

8: Award of costs against an unrepresented Claimant

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In Vaughan v London Borough of Lewisham and others the EAT considered whether the tribunal had been right to award costs against an unrepresented claimant with limited means on the basis that her claims were misconceived.

Ms Vaughan brought claims against her employer, the London Borough of Lewisham and the previous employer from whom she transferred under TUPE, as well as against a number of individual colleagues. The claims were for discrimination and harassment on grounds of race and/or disability, as well as for detriment suffered for alleged whistleblowing. At the end of the 20 day hearing, the employment tribunal, aware of the Claimant's employment status and limited means, ordered Ms Vaughan to pay a third of the Respondent's costs amounting to £87,000 (subject to the figure being reduced on assessment by the County Court).

Ms Vaughan appealed to the EAT on a number of grounds, including that:

- No deposit order had been sought.
- There had been no costs warning.
- No account had been taken of the Respondent's settlement offers.
- No account had been taken of the fact that she was unrepresented.
- In light of her limited means, the decision on costs was perverse.

The EAT found that the absence of a deposit order and costs warning did not make it unjust for the tribunal to exercise its discretion to award costs. Whilst acknowledging that the Respondents could be criticised for not having written to the Claimant setting out the weakness in her claims and warning her that costs would be sought, the EAT was not persuaded that such a warning would have deterred her. It further held that the offer to settle the claim for substantial amounts reflected the commercial reality that the Respondents were facing a twenty day hearing, not that they regarded the claims as credible and therefore the Respondents were not precluded from arguing that a claim

was misconceived.

The EAT acknowledged that allowing for the fact that a party is unrepresented is a relevant consideration in the exercise of discretion under the Employment Tribunal Rules of Procedure, however the Claimant's "fundamentally unreasonable appreciation of the behaviour of her employers and colleagues" was the decisive factor when assessing her conduct.

It concluded, following Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797, that a costs order did not need to be confined to sums the party could pay as it may well be that their circumstances improved in the future. Although the Claimant was currently unemployed, this had only occurred recently. The 36-year-old Claimant was relatively young and had at least 15 years experience in the care sector. Although she was signed off sick at the time of the appeal hearing, it was her intention to seek re-employment in this field once she was fully fit. Until shortly before the hearing the claimant had been earning £30,000 per annum and the EAT considered that there was no reason why she would not return to her chosen career at this level at some point in the future.

The EAT noted that the Respondents' had incurred considerable costs in defending an unmeritorious claim and concluded that it would not be just in the circumstances for the Claimant to walk away with no financial repercussion.

The EAT could not find an error of law in the tribunal's decision and the appeal was dismissed.

9: TUPE and Service Provision Change: The meaning of "an organised grouping of employees"

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It is a pre-requisite for a service provision change TUPE transfer that there is, immediately before the service provision change, an organised grouping of employees which has, as its principal purpose, the carrying out of activities on behalf of the client concerned.

In Eddie Stobart Ltd v Moreman (UKEAT/0223/11) it was held by the EAT that an organised grouping of employees means a client team put together by the service provider specifically to serve the client for whom the service is provided. This decision was followed by the EAT in Scotland in Seawell Ltd v Ceva Freight (UK) Limited (UKEATS/0034/11).

In this case the Claimant (Mr Moffat) was employed by Ceva Freight (UK) Limited which provided logistics and freight forwarding arrangements for Seawell, which owned offshore drilling platforms. Seawell then terminated this arrangement and put the service back in-house. Seawell was not the only client of Ceva, but Mr Moffat, who was a supervisor, spent 100% of his time on the Seawell contract. Other employees spent smaller percentages of time on this contract and the rest of their time on other contracts. An employment tribunal found that either Mr Moffat himself could comprise an organised grouping of employees or, alternatively, if the organised grouping of employees included Mr Moffat and colleagues, Mr Moffat was assigned to that organised grouping of employees as he spent 100% of his time on the service. On these alternative bases, the

tribunal found that he transferred under TUPE.

But the EAT disagreed. On the facts, there was no evidence that there was a group of employees specifically organised for this particular contract. An organised grouping of employees denotes a deliberate putting together of a group of employees for the purposes of the relevant client work. As the EAT remarked: “it is not a matter of happenstance”. There was no such conscious employee grouping on the facts of this case. As such, there was no service provision change and no relevant transfer. Now the Court of Session has upheld the decision of the EAT.

The Court of Session agreed with the EAT in Eddie Stobart that the concept of an organised grouping implies that there be an element of conscious organisation by the employer of its employees, in the nature of team, which has, as its principal purpose, the carrying out of the activities in question. On the facts of Seawell it could not be said that the employees who carried out practical tasks in connection with a contract were organised as a grouping having, as its principal purpose, the carrying out of those activities. When that is the case, it is not legitimate to isolate one of that number (Mr Moffat) on the basis that that employee in question devoted all or virtually all of his working time to assisting in the collaborative effort. Nor was the Court of Session impressed by Mr Moffat’s job description which indicated that Mr Moffat was employed for the purposes of enabling the contract with Seawell to be performed. He was not a member of an organised grouping of employees and his job description did not change that.

It is true that TUPE states that an organised grouping of employees may comprise a single employee. However, the Court of Session envisaged that that would apply to a case where the activities in question could be, and are carried out by, a single individual: “for example, the needs of a client of a cleaning firm may be for a single cleaner; or a firm of solicitors may undertake to provide a single qualified solicitor to advise full time a client such as an insurance claims handler”.

But that did not apply here. Where the activities were carried out by a “plurality” of employees, the reference in the TUPE definition to a single employee does not allow disaggregation of a number of employees who, although collectively assisting with a contract, were not organised into a client team for that purpose.

This decision is another example of the literal approach being taken by the appellate courts to the service provision change rules. It is to be noted that the Government has still not made up its mind whether or not to retain the service provision rules in the light of the growing case law on the subject.

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