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Employment Law News



Welcome to the September issue of Actons' employment law update
- keeping you all up to date in Employment Law issues.

We welcome your feedback - please let us know if you have any suggestions for improvements or alternative topics

As you were - TUPE in pre-pack insolvency cases

We reported on the case of *Oakland v Wellswood (Yorkshire) Limited* last year when a surprise decision from the EAT caused a stir in relation to cases where purchasers were buying businesses from administrators. The Court of Appeal has now reversed the EAT's decision in the above case, although it has not absolutely ruled out the application of Regulation 8(7) of TUPE in instances of pre-pack administration.

The facts relate to the sale by joint administrators of the business and assets of Wellswood Limited via a pre-pack to a newco, Wellswood (Yorkshire) Limited. Mr Oakland was an employee of the insolvent company whose contract of employment was taken over, with other employees, by the newco. Shortly after the sale Mr Oakland's employment was terminated and he claimed unfair dismissal on the basis that his contract had transferred to newco under TUPE. Wellswood (Yorkshire) Limited asserted that Mr Oakland did not have the qualifying period of employment to bring a claim of unfair dismissal as his contract of employment had not transferred under TUPE.

The EAT determined that on the basis that the administrators had been appointed with the ultimate aim of liquidation that Regulation 8(7) applied. As a result Mr Oakland had not maintained his continuity of employment under TUPE and was not eligible to claim unfair dismissal. This decision was at odds with guidance issued by the Secretary of State in 2006 as to when it would make payments from the National Insurance Fund. In its guidance the Secretary of State had indicated that TUPE would always apply in instances of pre-pack administration.

The written judgement on this case is still awaited, but in coming to its decision the Court of Appeal focused

on section 218(2) of the Employment Rights Act 1996. This states (irrespective of the application of TUPE) that the transfer of a business does not break the continuity of any employee who transfers with it. Although the Court of Appeal did not focus on TUPE in coming to its decision, it did indicate that it considered that it was unlikely that Regulation 8(7) would apply in relation to pre-pack administration sales. So, for the time being, we are back to where we thought we were!

TUPE and constructive dismissal

In another TUPE case, *Tapere v South London and Maudsley Trust*, the EAT has made a finding that determining whether a substantial change to working conditions post transfer causes an employee material detriment, is a subjective test. The formulation for detriment in the case of *Shamoon* needs to be followed, looking at the impact of the change from the employee's reasonable viewpoint, not by balancing the views of the employee and the employer. On the facts of this case, changing the employee's place of work to her detriment amounted to a dismissal.

Employment prospects poor for school leavers

A new report from the Prince's Trust and the University of Sheffield has warned that school leavers currently face the bleakest prospects since 1929. One in five teenagers may still be unemployed at age 21. The number of young people seeking unemployment benefit may double to one million. Over a third of those currently unemployed are under 25, as the recession appears to impact disproportionately on the youngest in the working age population.

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What constitutes disability?

In Chief Constable of Lothian and Borders Police v Cumming the EAT had to consider whether the fact that an applicant did not meet the entry requirements for promotion due to an eyesight defect should be taken into account in deciding whether she was suffering from a disability. The particular issue was whether the adverse effect of her eye condition was substantial enough to fall within the definition of disability. The tribunal decided that participation in professional life was a normal day to day activity and that as the claimant was prevented from being able to proceed to the next step of her professional life, she was disabled.

The EAT has overturned this decision, finding that the eyesight impairment gave rise only to limited and minor adverse effects. She was therefore not disabled. In addition there was no authority for the broad proposition that being afforded general participation in or access to professional life is a day to day activity for the purposes of the DDA.

Can we have our costs please?

Two recent cases have demonstrated a trend towards awarding costs in the employment tribunal against litigants who have lied which will be welcomed by employers. The first case was the case of Daleside Nursing Home Ltd v Mathew in which the tribunal found that the central allegation of racial abuse raised by the claimant was a lie but then refused to make a costs award against her. The EAT found that this was perverse since lying is

clearly unreasonable conduct. We have now had the case of Dunedin Canmore Housing Association v Donaldson, another EAT case in which the EAT concluded that the claimant had not approached the case honestly and reasonably and should therefore pay the employer's costs. Whether these cases will have wider application and lead to employers having greater success than previously in obtaining costs orders remains to be seen.

Religious discrimination cases increasing

Religious discrimination cases seem to be a growing area for those following employment law trends. News has now broken of a primary school receptionist bringing a claim against her employers alleging that she and her daughter, a pupil at the school, have been discriminated against on the grounds of their Christian beliefs. The case is believed to arise out of an email the receptionist sent to her church asking for prayers for her daughter and the school. The email came to the attention of the school and the employee was suspended and subsequently found guilty of serious misconduct. She has now in turn brought a claim of religious discrimination against her employer. Employers should note that employees seem to be increasingly willing to assert their rights in this area. The greatest difficulties arise where there are employees with conflicting beliefs.

No defence for Amnesty

In a recently decided case the EAT has found albeit reluctantly that there is no defence to a case of direct discrimination based on ethnic origin. The case concerned Ahmed, a Sudanese woman, who was refused promotion to the position of Sudan Researcher by Amnesty as they believed that such an appointment would compromise their perceived impartiality and therefore their effectiveness. She resigned and claimed race discrimination.

In their judgment, upholding the original tribunal's decision the EAT stated that this behaviour constituted direct discrimination contrary to sections 1(1)(a) and 4(2)(b) of the Race Relations Act 1976 as the decision not to appoint her was based solely on her ethnic origin. Motive was irrelevant, however benign. In an interesting finding though, the EAT found that even though the action constituted direct race discrimination it did not undermine the implied term of trust and confidence and did not amount to constructive unfair dismissal. Amnesty International had reached its decision after a thorough and reasoned process, motivated by no racial prejudice.

Average pay increase expectations drop below the rate of inflation

The latest quarterly CIPD/KPMG Labour Market Outlook survey shows that just 15% of respondents plan to conduct a pay review this quarter. Dr John Philpott, CIPD's Chief Economist, has warned that pay restraint can't be sustained indefinitely and a weak economic recovery could trigger a second wave of redundancies.

And finally.....

With apologies to those who already receive Personnel Today updates, the magazine has been running a competition to find the best out of office message. This is my favourite: "My favourite "Out of Office" story is about council workers in Swansea who erected a road sign informing motorists in Welsh "I am out of the office at the moment." Apparently, the English wording for the bilingual road sign was emailed to a translation service. When the automatic email response was triggered (in Welsh), workers assumed this was the translated wording for the road sign."

This update is provided free of charge and is a summary of the legal position at September 2009.

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