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Update: Employment Law Reform post 6 April 2012

Unfair dismissal: the qualifying period for unfair dismissal has now increased from one to two years. This affects all employees whose employment started on or after 6 April 2012.

Deposit orders: the maximum deposit order a tribunal can now require a party to pay if their claim has little reasonable prospect of success has now increased from £500 to £1,000.

Costs awards: the maximum amount of costs an employment tribunal can award (without referring the case to the county court for detailed assessment) has now increased from £10,000 to £20,000.

Witness statements: where witness statements are used in a hearing, they will now be taken 'as read' at the hearing (ie. not read out at the hearing) unless a judge or tribunal directs otherwise.

Witness expenses: state funded witness expenses have now been withdrawn. Tribunals have the power to direct parties to bear the expenses of any witness.

Judges to sit alone on unfair dismissal cases: unfair dismissal cases will now be heard by a judge sitting alone without lay members, unless the judge orders otherwise. The government has said that progress on this change will be reviewed after a year.

TUPE: substantial change in working conditions

In *Abellio London v CentreWest London Buses*, the five claimants worked as bus drivers for CentreWest, which ran the 414 bus route from its Westbourne Park depot. This location suited the employees' personal circumstances. The route was transferred to a new company, Abellio, which intended to operate the route from its own depot in Battersea. The claimants objected to the new location because it added between one to two hours to their travelling time per day. As a consequence, the claimants resigned.

The EAT held that the change in place of work comprised a substantial change to the employees' working conditions to their material detriment under TUPE. It also comprised a repudiatory breach of their contracts of employment because their mobility clauses did not extend to the Battersea area. As a result the EAT upheld the Tribunal's findings of constructive unfair dismissal. Accordingly, the dismissals were automatically unfair being by reason of the TUPE transfer.

This case follows the line of authority established by *Tapere v South London and Maudsley NHS Trust [2009]* (see October 2009 newsletter), where a similar change to a transferring employee's location was held to be in breach of TUPE. The recent Abellios decision reinforces the EAT's approach that the test for whether or not there is a "substantial change" in working conditions is a question of fact and will depend on the nature and degree of change.

TUPE: ETO Reason for Dismissal

In *Meter U Ltd v Ackroyd*, the employment tribunal considered whether a transferee could establish an economic, technical or organisational (ETO) defence to a TUPE related dismissal if the services provided by the employees are passed to franchised limited companies, following the transfer.

Following a TUPE transfer the new employer, Meter U took over certain meter reading contracts. Meter U then dismissed the transferring meter readers as redundant and used franchised companies to undertake the roles instead.

Where a dismissal is for a reason connected with the transfer, the employer may avoid liability for unfair dismissal if it can show that the reason for the dismissal was an ETO reason. Meter U argued that passing the function to franchised companies entailed a change in the nature and composition of its workforce, with companies replacing redundant employees. This was therefore an ETO reason and the resulting dismissals were lawful.

The EAT overturned the employment tribunal's findings of unfair dismissal and held that the facts in this case comprised an ETO defence. Whilst this decision demonstrates the possible advantages for service providers of setting up franchise models to operate contracts where TUPE may be an issue, care should be taken in using this as a way of avoiding TUPE liability as decisions in this area will always be fact sensitive.

Redundancy and Suitable Alternative Employment

In *Samsung Electronics v Monte D'Cruz* the EAT considered whether it was appropriate for employers to make subjective judgments when deciding whether to appoint redundant employees to alternative roles within the organisation.

In re-organising its print division Samsung abolished the claimant's role as well as two other Heads of Department roles and a new position of Head of Sales was created. The claimant unsuccessfully applied for this post. He was assessed on a presentation and scored against competencies normally used in the annual appraisal process. He then applied for a more junior role arising out of the re-structure. He was unsuccessful and an outside candidate was eventually appointed.

As a part of his challenge to the process, the claimant alleged that his failure to secure alternative roles was based on subjective judgments and as a result these decisions were unfair. The EAT reversed the employment tribunal's decision of unfair dismissal, stating that although "subjectivity" in redundancy cases was often seen as a "dirty word", where the employer was selecting a candidate for a new role, some subjectivity was inevitable.

This case highlights the distinction between the process for selecting an employee for redundancy (which should be based on objective criteria) and the process for deciding whether a redundant employee should be offered an alternative position. When considering an employee for suitable alternative employment, an employer does not have to confine itself to objective criteria but can appoint the candidate it considers best for the job, even if this is based on a subjective view.

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