RUSSELL-COOKE | SOLICITORS

EMPLOYMENT LAW UPDATE

1. Shared Parental Leave and other changes to family rights

Parental Leave

The entitlement to 18 weeks (unpaid) leave was extended to up to the child's 18th birthday on 5 April 2015.

Time off to attend Ante-Natal Appointments

Since 1 October 2014 fathers (and partners of pregnant women and those having children via surrogacy) have been entitled to time off work to attend two ante-natal appointments (each lasting up to 6½ hours). Employees must have a "qualifying relationship":

- They are the parent, woman's husband or civil partner;
- Live with the pregnant woman in an enduring family relationship and are not the parent, grandparent, sibling, aunt or uncle of the pregnant woman;
- Are the expected child's father;
- Are one of a same-sex couple who is to be treated as the child's other parent; or
- Are a potential applicant for a parental order in relation to a child who is expected to be born to a surrogate mother.

If the employer requires it, the employee must provide a written declaration stating:-

- The qualifying relationship they have with the pregnant woman or expected child;
- That the purpose of taking the time off is to attend an ante-natal appointment;
- The appointment has been made on the advice of a registered medical practitioner, midwife or nurse; and
- Date and time of appointment.

An employer has the right to refuse time off where it is reasonable to do so. If time off is unreasonably refused employees can make a claim in the Employment Tribunal.

Adoption Leave

Existing rights are extended to those fostering for adoption. Since 5 April employees proposing to adopt have the right to take time off to attend up to 5 adoption meetings. The

time off must be paid where the employee is adopting on their own. If the adoption is joint, one is entitled to paid leave and the other unpaid leave.

Requests for Flexible Working

Since 30 June 2014 all employees with 26 weeks continuous service have the right to apply for flexible working and they no longer need a specific reason for making an application. On receipt of an application the employer must deal with the request in a reasonable manner and within three months from receipt of the request unless an extension is agreed. The prescribed procedure that applied to parents and carers has been abolished.

The following changes can be requested:

- A change to working hours;
- A change to the times the employee is required to work; and/or
- A change to the location of work;

If the request is accepted this results in a permanent change and there is no right to revert back to the former working pattern (no change).

The employer may still refuse based on the prior business reasons namely:-

- Burden of additional costs;
- Detrimental effect on the ability to meet customer demand;
- Inability to reorganise work among the existing staff;
- Inability to recruit additional staff;
- Detrimental impact on quality;
- Detrimental impact on performance;
- Insufficiency of work during the periods the employee proposes to work; and
- Planned structural changes.

There is no longer a statutory right to be accompanied at any meeting to discuss a request but it is good practice. Similarly it is good practice to allow an employee to appeal against a refusal or part-refusal.

An employee has the right to complain to a Tribunal if the employer has not followed the right procedure or has rejected the application on a ground that is not a permissible reason or based on incorrect facts. The Tribunal can order the employee to reconsider the request and/or pay compensation of up to 8 weeks pay subject to the statutory cap.

Acas has published a Code of Practice and a guide on the right to request flexible working http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf

Shared Parental Leave (SPL)

Shared parental leave applies to children born or adopted after 5 April 2015 and replaces additional paternity leave. Mothers can still take their full entitlement of 52 weeks maternity leave and fathers can take basic paternity leave so SPL is optional and dependant on both parents working.

SPL is designed to give parents flexibility to share the care of their child in the first year. A mother can opt to end her maternity leave and pay after the 2 week period of compulsory maternity leave and exchange the remaining 50 weeks of leave for SPL which can be divided between the parents who take leave at different times or at the same time.

SPL is available to mothers/adopters and farthers/partners of the mother/adopter.

Eligibility

- SPL is available to the mother, father or main adopter of the child or their partner;
- The employee must have or share the main responsibility for the care of the child;
- Have at least 26 weeks continuous employment by the 15th week before the expected week of childbirth (EWC) or at the week in which the main adopter was notified of having been matched for adoption with a child ("the relevant week").

In addition the other parent must have:

- At least 26 weeks employment (or self-employment) out of the 66 weeks prior to the relevant week;
- Average weekly earnings of at least £30 during at least 13 of the 66 weeks prior to the relevant week.

Amount and Timing of SPL

- SPL must be taken in blocks of at least one week and within one year of the baby's birth or placed for adoption. Parents can take leave separately or at the same time either as a continuous block or as up to three discontinuous blocks (for each parent);
- SPL is in addition to the statutory right to two weeks paternity leave but paternity leave must be taken before SPL.

Eligibility for Shared Parental Pay (SHPP)

- In addition to the eligibility conditions for SPL an employee who wishes to claim ShPP must have average weekly earnings of at least the lower earnings limit (currently £111 a week) over the 8 week period ending with the relevant week;
- ShPP is payable for up to 39 weeks, reduced by the number of weeks statutory maternity/adoption pay or maternity allowance already taken by the mother or the main adopter. It is paid at a standard weekly rate (£139.58 from 5 April 2015) or 90% of normal weekly earnings whichever is lower.

Shortened Maternity Leave

- Maternity leave must be shortened by the mother serving a curtailment notice to end maternity leave early of at least 8 weeks and also by giving notice to end her maternity pay period;

- Normally the leave curtailment notice cannot be revoked. However if served before the baby is born, it can be revoked before the child is 6 weeks old and a fresh curtailment notice can be served at a later date.

Entitlement and Intention Notice

Employees must provide a non-binding notice of their entitlement and intention to take SPL including: both partners details, maternity leave taken, the balance remaining, the baby's date of birth, how much SPL and ShPP each employee intends to take, a non-binding indication of when the employee plans to take SPL and a declaration from both partners that they qualify for and agree to the division of SPL/ShPP and agree to the data being processed.

The Acas Guide Shared Parental Leave suggests that on receipt of a notice of entitlement and intention to take SPL, it is good practice for the employer to seek an informal discussion about the employee's plans to cover the proposed leave arrangements, what impact the employee's absence will have on the business and what steps can be taken to mitigate this and whether any modification of the proposed pattern of leave to reduce the impact on the business might be agreeable to the employee.

Period of Leave (Booking) Notice

- Employees must give 8 weeks notice before taking a period of SPL which confirms the proposed leave dates and division of pay;

- Each partner can give up to three notices to book a period of continuous or discontinuous SPL. Employers cannot refuse continuous SPL.

- If the employee requests discontinuous SPL the employer must respond in writing within 14 days of the request. If the discontinuous pattern is refused the employee may take the total number of weeks requested as a continuous period beginning on the original start date or take a continuous block starting on a new date provided that the employee notifies the employer of the new date within five days of the 14 day period above or may withdraw the request at any time up to the 15th day after it was originally made. If it is withdrawn, it will not count as one of the employee's three requests.

Varying a Period of Leave

An employee may submit a request to vary a period of leave in the following ways:

- Vary the start or end date provided the variation is requested at least 8 weeks before the original start date and new start;

- Vary or cancel the amount of leave requested at least 8 weeks before the original start date;

- Request a continuous period of leave becomes a discontinuous period of leave or vice versa.

A variation will count towards one of the employee's three period of leave unless:

- It is made as a result of the child being born earlier or later than the expected week of childbirth;

- The employer has requested the variation;

- The employer has agreed to allow more than three periods of leave notices.

Rights During SPL and Return to Work

The employer is entitled to make reasonable contact with an employee on SPL in the same way as during maternity leave.
An employee on SPL can by agreement work up to 20 days during any SPL period without losing their entitlement to SPL or ShPP. These days are referred to as "SPLIT" days and are in addition to any keeping in touch (KIT) days worked during maternity or adoption leave. Once an employee starts a period SPL any unused KIT days are lost.

An employee on SPL has the same rights and duties as an employee on maternity leave.

An employee returning from SPL is normally entitled to return to the same job if they are coming back from statutory leave including SPL of 26 weeks or less. If the period exceeds 26 weeks and it is not reasonably practicable to permit the employee to return to the same job, they are entitled to return to a suitable alternative.

What are the Next Steps?

1. Consider whether ShPP is to be enhanced in line with any maternity pay enhancement.

2. As the rules are complex it will be sensible to draft a policy and provide draft forms to help employees make the necessary notification.

3. Managers will need training to navigate the rules and discuss with their staff.

Are there Risk Areas?

1. A question that has arisen is whether it will be discriminatory not to offer enhanced ShPP if maternity pay is enhanced. The case of ***Shuter v Ford Motor Company Limited*** concerned a Claimant who claimed sex discrimination on the grounds that the company's practice of offering women on maternity leave 100% of their basic pay for the duration of their maternity leave compared to his statutory APL was discriminatory. His claims of direct and indirect discrimination failed, the Tribunal finding that the correct comparator would have been a female member of staff taking APL and not a mother taking maternity leave and (in the case of the male dominated workforce) Ford was justified in offering enhanced maternity pay in order to retain and increase the number of women in the workforce. Following the same argument, we do not believe the prospects of a successful direct sex discrimination challenge are high but query whether indirect discrimination could be justified in a more gender balanced workplace.

2. Is there any objection to enhancing ShPP for the first few months and then reverting to ShPP in order to encourage parents to return to work? What about making enhancements for the first period but not the second and third periods of SPL to encourage continuous leave? Again this may be an area for litigation but probably difficult to establish one gender whould be more disadvantaged than the other. But

query whether employers may find short periods of discontinuous leave easier to manage in the workforce than a lengthy period of SPL.

3. Paying SHPP at a lower rate than maternity pay would have to be justified on more than grounds of cost in a female dominated or balanced workforce.

The Department of Business Innovation and Skills has published an Employer's Technical Guide to Shared Parental Leave and pay
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389716/bis-14-1329-Employers-technical-guide-to-shared-parental-leave-and-pay.pdf

Acas has published a Code of Practice and a Guide to SPL
http://www.acas.org.uk/media/pdf/r/q/Shared-Parental-Leave-a-good-practice-guide-for-employers-and-employees.pdf

2. Exit Negotiations Update

The government introduced new provisions under S111A Employment Rights Act 1996 relating to pre-termination negotiations in July 2013 to allow employers and employees to enter into confidential negotiations with a view to reaching agreed terms on ending the employment relationship as it was considered the Without Prejudice rule which only covered negotiations where the parties were in dispute was too restrictive.

However a 2014 case suggests that the application of the Without Prejudice rule may be wider than previously considered. In the 2004 case of ***BNP Paribas v Mezzotero*** the EAT appeared to set the bar high in holding that there was no existing dispute where an employee who had raised a grievance about her treatment on return from maternity leave was offered a termination by mutual consent. The 2014 case of ***Portnykh v Nomura International Plc*** concerned termination discussions following the employer's announcement of an intention to dismiss the employee for misconduct. The negotiations covered the terms on which the termination could be framed as a redundancy but broke down and the employee brought a claim alleging he had been dismissed because he had made a protected disclosure. The employer sought to rely on evidence of the negotiations in support of its case that the dismissal had been by reason of misconduct but the Claimant argued that the evidence was Without Prejudice and therefore inadmissible. The Tribunal found that the evidence was not privileged on the basis there was no existing dispute following BNP Paribas but on appeal the EAT concluded there will be a "dispute" where there are negotiations about a disagreement likely to lead to litigation if not settled. It considered that this will very often be the case in an employment context and that a settlement agreement is intended to compromise potential claims and prevent a Claimant from litigating his dismissal. It considered the employee need not have made an allegation of unfair dismissal or some other breach for there to be a dispute and any eventual dispute did not necessarily need to be in precisely the same terms as in existence at the time the compromise is offered. The Judge held that "if the employer announces an intention to dismiss the employee for misconduct and there are then discussions around the question of the alternative of the dismissal being redundancy ... it seems to me beyond argument that it either demonstrates a present dispute or contains the potential for a future dispute." He also suggested that there may be circumstances in which the Without Prejudice rule might attach to negotiations without a dispute if the parties agreed, expressly or impliedly, that it should apply at the time of their discussion. This decision from the EAT appears to reduce circumstances in which employers need to fall back on Section 111A but it will generally be safest to frame any proposal as both Without Prejudice and within the scope of Section 111A.

Acas has published a Code of Practice and Guide on Settlement Agreements under S111A http://www.acas.org.uk/media/pdf/j/8/Acas-Code-of-Practice-on-Settlement-Agreements.pdf

There are various taxation issues arising from settlement agreements. One of them is whether compensation awarded for injury to feelings is taxable. In ***Moorthy v Revenue and Customs Commissioners*** the First Tier Tribunal held that any payment directly or indirectly made in connection with the termination of employment is taxable except the first £30,000. Therefore injury to feelings payments should be taxed unless employment continues.

Moorthy v HMRE Commissioners JC/2013/09436

3. Maternity Leave

Under Regulation 10 of the Maternity and Parental Leave etc Regulations 1999 an employee on maternity leave who becomes redundant is entitled to be offered a suitable alternative vacancy on terms and conditions that are not substantially less favourable to her. If the employer fails to offer a suitable vacancy and dismisses by reason of redundancy, that dismissal will be automatically unfair. In ***Sefton Borough Council v Wainwright*** the Council merged two roles, Mrs Wainwright's role as Head of Overview and Scrutiny and a male employee's role to create a new role of Democratic Service Manager (DSM). Both employees were interviewed and while it was accepted by the Council that both were qualified for the role and that Mrs W would have been slotted into it had she been the only employee affected, the Council considered the male employee to be more suitable and appointed him. The Council resisted Mrs Wainwright's claim on the basis that there was no redundancy until it had decided who was to have the new role and the restructure was complete by which time her period of maternity leave had ended. Both the Tribunal and the EAT rejected this argument on the basis that it would undermine the protection afforded by Regulation 10 if it was left to the employer to determine when the redundancy arose. Employers could state that there was only a redundancy after others had been redeployed into what might otherwise have been suitable alternative vacancies. The Council should not have required Mrs W to engage in a selection process but whether that meant that they had to offer her the DSM or whether it could have offered another suitable available vacancy was for it to assess. It would have been open to them, at that point, to have taken into account their wish to appoint the best person to the new role and it might not have been proportionate to have required them to offer Mrs W a particular vacancy (the DSM role) if something else would also have been suitable. Interestingly Mrs W's discrimination claim failed as under Section 18 of the Equality Act a woman has to show unfavourable treatment because of pregnancy or maternity leave. It was considered that the unfavourable treatment/her role being made redundant and her not being offered a suitable alternative vacancy – was not inevitably due to her maternity though it coincided with her period of maternity leave. The Tribunal should have asked why she was treated as she was and it was not entitled simply to assume that because there had been a breach of Regulation 10, there was inherent discrimination.

Sefton Borough Council v Wainwright EAT 13.10.14 (0168/14)

4. Holiday Pay

The case of ***Lock v British Gas Trading Ltd*** concerned the calculation of statutory leave under the Working Time Regulations 1998 which implement the Working Time Directive. The ECJ found that the calculation of the Claimant's holiday pay after a period of annual leave when he had been unable to earn commission infringed his right to paid annual leave under the Directive as it constituted a financial disadvantage that was capable of deterring

workers from taking annual leave. As commission payments were directly linked to the Claimant's work and formed part of his normal remuneration he was entitled to receive additional sums representing commission that he would have earned had he not taken annual leave.

Lock v British Gas Trading Ltd 2014 EUE CJC – 539/12

Following **Lock** in the case of ***Bear Scotland Ltd and ors v Fulton*** the EAT held that in light of the ECJ decision, payments of non-guaranteed overtime which were made with a sufficient degree of regularity to form part of a worker's normal remuneration should also be taken into account when calculating holiday pay under the Directive. The EAT determined that the Working Time Regulations could be construed to include this within the pay received for the basic four weeks leave under Regulation 13 but as the additional 1.6 weeks introduced by Regulation 13(a) does not derive from the Directive this is not affected. Many contracts already stipulate that in calculating holiday entitlement the first four weeks are statutory but it will be sensible for contracts to expressly state this to avoid disputes about whether overtime should be included in the calculation for the whole period. The EAT also helpfully held that in considering under payments a series of deductions is broken by any gap of more than three months between deductions. Further it was held that a claim may be taken no more than two years after the period of under-payment complained of.

The government has since introduced the Deduction from Wages (Limitation) Regulations 2014. They do 2 things:-

1. Limit unlawful deductions claims to 2 years before the date the ET1 is lodged.

2. State the right to paid holiday is not a contractual term to prevent employees brining breach of contract claims for back holiday pay.

The Regulations only apply to claims lodged from 1.7.15.

Bear Scotland Ltd and ors v Fulton EAT 0047/13

5. Disability Discrimination

The ECJ has held that while there is no general principle prohibiting discrimination on the ground of obesity, obesity may amount to a disability for the purposes of the EU Equal Treatment Framework Directive (implemented by the Equality Act 2010) where it hinders the individual's full and effective participation in professional life. The ruling is in line with previous decisions of the UK courts that while obesity does not necessarily render a Claimant disabled, it might make it more likely that he or she is because of associated impairments such as diabetes that impact on day to day activities.

Kaltoft v Municipality of Billund ECJ (Case C-354/13)

6. Collective Redundancy

The Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) provides that where an employer proposes to dismiss 20 or more as redundant at one establishment within 90 days he must consult with appropriate representatives of the affected employees. An establishment had generally been interpreted as one location or business unit. The EAT's decision in ***USDAW v Ethel Austin Ltd*** and another case known as the ***Woolworths*** case in 2013 sent shock waves by holding that in its view, the restriction was incompatible

with the EU Collective Redundancies Directive and the obligation to consult arises whenever an employer proposes to dismiss as redundant 20 or more employees across the business. The Wooldworths case is now before the European Court joined with cases from Northern Ireland and Spain and the Advocate General recently published his opinion that dismissals do not need to be aggregated across the whole of the employer's business to determine whether the collective redundancy thresholds have been met and the prior interpretation would therefore be legitimate. The ECJ generally but not invariably follows the Advocate General's opinion and is not due to give its judgment until later in the year. For the time being the EAT's cautious approach should be followed and collective consultation should be implemented where there will be 20 or more redundancies in a 90 period.

Lyttle and ors v Bluebird UK Bidco 2 Ltd and ors ECJ S.2 15 (C-182/13)

7. Whistleblowing

The case of ***Norbrook Laboratories (GB) Limited v Shaw*** considered whether separate communications, taken together, could amount to a qualifying disclosure even if none of them, taken separately, would have done so. It was held that a manager who had expressed concerns in three emails to two recipients about employees driving in snowy conditions had made a qualifying disclosure concerning health and safety. Training managers to recognise complaints that may constitute qualifying disclosures and therefore confer whistleblowing protection is key.

In ***Chestertons v Nurmohamed*** a director in the estate agency's Mayfair office alleged that the company was manipulating its figures to understate profits thereby driving down bonuses for its staff. He was later dismissed and brought an unfair dismissal claim that included reliance on having made protected disclosures that the company had breached its legal obligations. The Tribunal accepted that the Claimant believed his disclosure was in the interests of around 100 senior managers and that this is a sufficient section of the public to satisfy the public interest test.

The EAT upheld the decision on the basis that no more is needed than reasonable belief that a disclosure is in the public interest as long as that belief is objectively reasonable.

Norbrook Laboratories (GB) Limited v Shaw 2014 ICR 540

8. Fixed Term Contracts

In ***University and College Union v University of Sterling*** the Court of Session considered whether the termination of fixed term contracts counts towards the threshold figure of 20 in collective redundancy cases. It held that if the reason for terminating the contract is individual i.e. the expiry of the fixed term, it will not count towards the number required to trigger the duty to consult. However the fixed term contract should be included where the employer is proposing early termination before the expiry of the fixed term by reason of redundancy. The government has since passed the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (SI2013/763) amending TULR(C)A in the light of the this decision. Since 6 April 2013 where an employer is proposing to dismiss 20 or more employees at one establishment within 90 days the proposed dismissal of employees on fixed term contracts at the agreed termination dates are excluded from redundancy consultation obligations.

University and College Union v University of Sterling 2014 CSIH5

9. National Minimum Wage

The issue of whether the National Minimum Wage is payable for all hours that workers are on standby or "sleep-ins" is of great importance in the sector. Regulation 15(1A) of the National Minimum Wage Regulations 1999 provides that where, by arrangement, a worker sleeps at or near his or her place of work and is provided with suitable facilities for sleeping, only time when the worker is awake for the purpose of working is treated as time work. However in ***Whittlestone v BJP Home Support Ltd*** the EAT held that a care provider who had never been called on to attend service users during her sleepover shifts at their home was nevertheless carrying out time work under the Regulations and was therefore entitled to the NMW in respect of those shifts. It was held that the fact she was not called on during the night was irrelevant as her job was to be present and she would have been disciplined had she not been. The carer was also entitled to the minimum wage for her travelling time between the homes of service users because she was carrying out "assignment work" for the purposes of the Regulations. Similarly in ***Esparon t/a Middle West Residential Care Home v Slavikovska*** the EAT held that an employee was entitled to the NMW for each hour of an overnight shift in a residential care home. The Tribunal had been entitled to find that she was not merely on call but was engaged in time work notwithstanding the fact that the employer provided sleeping facilities. The decision was influenced by the Tribunal's finding that the employer needed the employee to be on the premises overnight to comply with its statutory obligations.

These cases make increasingly likely that organisations may fall foul of the Regulations if they are not paying NMW rates and it is not clear whether the absence of statutory obligations would make a difference.

Whittlestone v BJP Home Support Ltd 2014 ICR 275

Esparon t/a Middle West Residential Care Home v Slavikovska 2014 ICR 1037

10. Sickness Absence

The new Fit For Work Service (FFW) is and is meant to be available to employers in May. It will provide:-

- Free health and work advice through its website and telephone advice line to help with absence prevention;

- Free referral for an occupational health assessment for employees who have reached or whose GP expects them to reach 4 weeks of sickness absence.

Online and Phone Advice

FFW can be contacted as many times as required and can give employees, employers and GPs advice about work-related health matters or when an employee is absent from work due to sickness. The advice could help for example identify any adjustments to assist maintaining the employee in work.

Occupational Health Assessment

Employees may be referred for OH assessment at 4 weeks absence or if the GP judges the employee will be absent for 4 weeks and that a referral may be beneficial.

Both GPs and employers can refer employees dependent on the employee's consent and the referrer considering there is a reasonable likelihood of the employee making, at least, a phased return to work.

There is no limit on the number of employees referred by an employer but each employee may only be referred for one assessment in a 12 month period.

Assessment by FFW

Once an employee is referred, FFW anticipates contacting the employee to make a phone assessment within two working days. The occupational health professional who undertakes the assessment becomes the employee's case manager for the whole FFW process. If a face to face assessment is necessary the assessment will take place within five working days of this decision. It will take place at a location within 90 minutes travelling time by public transport from the employee's home address and the employee can claim reasonable travel expenses from the FFW provider. The assessment (described as a "biopsychosocial holistic assessment") involves the employee describing their concern, their job role and any factors affecting their return to work. The purpose of the assessment is to identify obstacles preventing the employee's return and for the employee and case manager to agree a Return to Work Plan to enable a return to work. If the employee consents, the case manager may contact an appropriate individual at the employer e.g. the line manager to assist in the creation of the Plan.

Return to Work Plan

This will be provided to the GP and employer with the employee's consent though the employee can ask for specific parts of the Plan to be removed before it is shared. The Plan will cover a specified period of time and will state whether the employee is fit for work or whether they may be fit for work subject to the employer following certain recommendations. It may include advice for the employee and their GP and may suggest further potential sources of assistance. While all parties are "encouraged to act on the recommendations" it is for the employer to decide whether to implement any recommendation. The employee's case manager will contact them at an arranged point to check if the plan is on course and again shortly after the return to work date. Where an employee is not fit to return in the timescale estimated in the Plan, the case manager will consider whether a further assessment is necessary. Where recommendations in a Plan have not been implemented the case manager may contact the employer to ensure the recommendations have been understood.

The Plan should provide sufficient information for the employer to decide on fitness to work and can be accepted in place of a fit note. The guidance suggests employers should refrain from requesting fit notes in these circumstances. The employee will need a fit note to cover the period between a referral being made and a Plan being shared.

Discharge from FFW

Employees will automatically be discharged:

- two weeks after they have returned to work (including the beginning of a phased return);

- on the date when FFW decide there is no further assistance they can offer the employee which will be either when the employee has been with the service for three months or when FFW decides the employee will be unable to return to work for three months or more.

Tax exemption for recommended medical treatments

The government has introduced a tax exemption of up to £500 (per tax year, per employee) on medical treatments recommended to help employees return to work under this scheme.

Department for Work and Pensions: Fit for Work Guidance:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408274/fit-for-work-employers-guide-feb-2015.pdf

Organisations should consider amending contracts and Sickness policies to refer to the service but note its limitations compared with a physician appointed by the employer.

11. TUPE Update

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 ("TUPE 2014") came into effect on 31 January 2014. The regulations included some important changes to the TUPE Regulations.

Contractual variations

It continues to be the case that changes to employees' terms and conditions are void if the sole or principal reason is the transfer. Previously, changes to terms and conditions for a reason "connected to the transfer" were also invalid but this has now been removed. However, organisations should continue to be cautious when making any contractual change as there has been no case law on the distinction and changes could be found to be by reason of the transfer.

TUPE 2014 now provides that changes are permissible:-

- where the variation of terms incorporated from a collective agreement takes effect more than a year after the transfer and the new terms are overall no less favourable. What constitutes "less favourable" terms in this context has not been determined by case law; or
- where collective agreed terms are renegotiated after the transfer, without the transferee's involvement. In other words, the incoming employer will still be bound by the collective agreement in force at the time of the transfer, but will no longer be bound by changes negotiated and agreed by the outgoing employer after the date of transfer if the incoming employer is not a party to the process.

It remains the position that changes may also be permissible in the following circumstances:-

- the sole or principal reason is an economic, technical or organisational reason entailing changes in the workforce ("ETO reason") and the employee agrees the change. An ETO reason must involve a change to workforce numbers or job functions; or a change to work location as set out below;

- where the contract of employment allows the variation in question but the transfer can't be the reason;

- employers and employees agree changes favourable to the employee.

Change in workplace location

A common change in a transfer scenario is a change to workplace location. The expression "changes in the workforce" now specifically includes a change to the workplace so that a

dismissal due to a change in workplace will not be automatically unfair. However, the change does not resolve the difficulty of employees resigning pre-transfer because they are unhappy with relocation and therefore concerns in this area remain.

Activities

The meaning of "activities" within the Regulations is now "activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out'. This change reflected pre-existing case law but the cases are very fact specific and this remains an area of uncertainty.

Redundancies

Where an employer proposes to make 20 or more redundancies in a 90 day period, the collective consultation requirements are triggered and a 30 or 45 day consultation must be followed depending on the numbers involved. Where there are fewer than 20 employees being made redundant, there is still a requirement to consult individually but there are no prescribed time limits. The Regulations now allow for the period of collective consultation to start before transfer and run concurrently with TUPE consultation. The transferor must agree to the pre-transfer consultation but there is no obligation for the transferor to provide information or assistance.

Employee liability information

Transferors are now required to provide transferees with Employee Liability Information 28 days before the transfer rather than 14.

Micro businesses

Micro businesses (10 or fewer employees) may now consult directly with the workforce rather than electing or appointing representatives.

Case Law

In cases concerning changes in service provision one of the conditions for TUPE to apply is that immediately before the SPC there is an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client. If an organised grouping is identified the question of the assignment of individual employees arises. Case law has established that assignment cannot be established simply on the basis of the amount of time spent on the contract (or on the transferring part of the business in non SPC cases). In ***Costain Limited v Armitage and Another*** the EAT considered whether Mr Armitage a Project manager whose time was divided between a number of projects was assigned to the contract that transferred. Mr Armitage's employer had estimated that Mr Armitage spent 80% of his time on the transferring contract and was therefore told his employment would transfer to Constain. This was upheld by the Employment Tribunal at an initial hearing. On appeal the EAT criticised the Tribunal in focusing solely on the percentage of time the Manager had spent on the transferring contract rather than undertaking a thorough examination of all the facts and circumstances. The EAT stated that the Tribunal should have defined the organised grouping of employees and then decided whether Mr Armitage was assigned to it. In doing so a Tribunal should not assume that every employee who carries out work for the client is part of the transferring group but should look at all the facts of the case. This is a reminder that the allocation of time is not the only determining feature, others include for example the value of the time, the terms of the employment contract and how the cost of the employee's services is allocated between the different contracts.

Costain Limited v Armitage and Another EAT 0048/14

The case of ***London Borough of Hillingdon v Gormanley*** concerned Robert Gornmanley

Limited which employed three members of the same family who carried out painting and decorating for the housing stock operated by the London Borough of Hillingdon. When the Council took the service back in-house the Employment Tribunal found that the employees were assigned to an organised grouping of employees working within RG Limited. This decision was overturned by the EAT which held that in order to determine assignment, consideration must be given to the contractual duties of employees in the transferors organisational framework and it considered that as the Claimants could be called upon to perform duties other than for Hillingdon under their contracts, they were not assigned.

London Borough of Hillingdon v Gormanley UKEAT/0169/KN

Unfortunately leave to appeal on whether TUPE can apply when an employee moves from sole employment with one employer to joint employment with more than one employer including the original employer has been refused. Another interesting case on whether an employee on long-term sick leave and in receipt of PHI payments was assigned tothe part of a business that transferred has not yet been reported.

12. Making contractual variations: Three recent cases

We frequently find that policies in a staff Handbook are expressly incorporated into the employment contract or, their contractual status is unclear. In ***Sparks and Others v Department for Transport*** the court considered the status of an attendance management policy contained in the staff Handbook. The Handbook was divided into two parts A and B and part A included terms and conditions which were intended to form part of the Claimants' contracts insofar as they were "apt for incorporation" while part B contained procedures and guidance relevant to the operation of the contractual terms. The Handbook provided that the contract could not be changed "detrimentally" without the consent of the employees or a recognised trade union and that proposals affecting staff would be the subject of consultation with a view to reaching agreement with the recognised trade union. The absence management provisions were contained in part A and following unsuccessful negotiations with the unions in 2012 the DFT imposed a new attendance management procedure which triggered action after five working days (or three occasions) of absence in a rolling 12 month period. The second trigger would occur after 8 days (or four occasions) in a rolling 12 month period. The Claimants' applied to the High Court for a declaration that the new procedures did not vary their original terms and were not contractually binding as the DFT had committed an anticipatory breach of contract in imposing the new procedures and the application of those procedures in any individual contract would amount to a breach. The judge reviewed the contents of part A and, interestingly, formed the conclusion that terms relating to notification of absence, medical certification and occupational health referrals were not apt for incorporation. He considered however that the triggering clause was apt for incorporation as it was precisely set out and its potential consequences were serious, leading to formal processes and even dismissal. He then considered the provision allowing the employer to vary unilaterally as long as the variation was not detrimental. Considering the variation in question he held that it was detrimental and therefore the DFT was not entitled to unilaterally vary the terms of the policy and the declarations applied for were granted. The case highlights that variation clauses must be clearly and unambiguously drafted to allow variation within the duty to maintain trust and confidence.

Sparks and Others v Department for Transport High Court (QBD) 2015 EWHC 181

In ***Norman and Another v National Audit Office*** two Claimants had offer letters that stated "detailed particulars of conditions of service are to be found in the relevant sections of the HR Manual of the NAO. They are subject to amendment, any significant changes affecting staff in general will be notified by management circulars, policy circulars or by general orders while changes affecting your particular terms and conditions will be notified separately to you." Following an unsuccessful attempt to agree changes to sick leave entitlement the NAO unilaterally imposed changes upon 80 employees notifying them by a letter and policy circular. Two employees sought a declaration to establish whether their terms and conditions had been validly varied. The Employment Judge found that the NAO had had the ability to vary and in particular relied on the wording that changes would be "notified" to employees. The EAT reversed this decision finding that the wording was not clear and unambiguous and did not clearly reserve the right to amend unilaterally. The use of the word "notify" did no more than require the employer to inform employees of changes and did not establish a right to make changes unilaterally.

Norman and Another v National Audit Office EAT 15.12.14 (0276/14)

In a third case a teacher was appointed to work two days a week and the offer letter stated that she would discuss which days were "mutually most convenient." In the period between the letter of appointment and the contract the Claimant agreed to increase her hours from 2 to 2½ and then to three days per week. She always worked Tuesday, Wednesday and Thursday. During her time at the school she also agreed to work on Mondays for two terms to cover for an absent colleague and was flexible as to the time she worked and the location. When she received a contract 21 months after her appointment it stated that she was required to work "all school hours while the school is in session and at any time ... as may be necessary in the reasonable opinion of the principal for the proper performance of his/her duties." It also provided that for part time staff the fractional part would be notified separately and "may be subject to variation depending on the requirements of the school timetable." Ten years later the school asked the Claimant to spread her working hours over five days instead of three but failed to reach agreement and eventually the school insisted that the changes be imposed. Two days later the Claimant resigned and claimed constructive dismissal on the basis of the unilateral change to her working hours. The Employment Judge did not accept the Claimant's contention that she only worked three days per week by custom and practice and found that the school had a contractual right to vary the contract in the way it did and that it had consulted her properly. The EAT found that the reference to variation depending on the requirements of the school timetable was not sufficiently clear to amount to a power of unilateral variation and constituted a breach of contract. It remitted the question to a new tribunal of whether this was the principal reason for the resignation which was not accepted by the employer.

Hart v St Mary's School (Colchester) Ltd EAT 8.1.15 (0305/14)

13. ACAS Early Claim Conciliation

Mandatory early conciliation (EC) introduced by the Enterprise and Regulatory Reform Act 2013 has now been in operation for a year. The requirement to apply for EC applies to **relevant proceedings** which covers most of the main Tribunal claims e.g. unfair dismissal, discrimination, TUPE, working time and national minimum wage.

EC Procedure

1. A prospective Claimant must apply to Acas either using their online form or by phone so that Acas can complete the form. One EC form is required for each Respondent to the claim. The EC form does not request any details about the nature of the dispute or the

potential claims, simply the names and contact details of the parties, the dates of employment, the prospective Claimant's job title and the date of the event on which the Claimant relies to bring a claim.

2. On submission of the EC form from the employee (but not if the employer initiates) the limitation period is frozen for a period of one month for early conciliation.

3. On receipt of the EC form Acas makes reasonable attempts to contact the parties to establish whether they consent to conciliation. If Acas is unable to make contact with either party, it must conclude that settlement is not possible and issue an EC certificate. If either party does not wish to participate in early conciliation, Acas issues an EC certificate.

4. The EC period of one calendar month follows starting on the date Acas receives the EC form. The period can be extended for up to 14 days by agreement between the parties.

5. If settlement has not been achieved, Acas issues an EC certificate at the end of the period or at any time during the conciliation period if they conclude that settlement is not possible. Once the certificate is issued the suspension of limitation period ends and the claim may be submitted.

The following issues arise:-

- there is no guarantee that employers will receive advance notice of claims if the claimant is not contactable or does not wish to pursue EC. Acas will only be required to make reasonable attempts to make contact;
- the claimant is not required to specify the nature of the claim in the EC form and Acas may therefore have little information about it.
- the rules relating to the extension of the time limit for lodging claims are complex and employers will therefore need to check carefully that claims have not been issued in time before asserting this;
- settlement agreements need to compromise all claims even if they have not been raised during EC.

Acas has recently released statistics showing 58,954 notifications in the first nine months of the scheme. Only 8.7% of employees rejected the offer of early conciliation and, where employers were contacted (where the employee has accepted conciliation) 11.3% of employers rejected the offer. Of the notifications received in the first six months 76.8% did not progress to tribunal, 16.3% reached settlement via a COT3 and 60.5% were either settled informally or the employee did not pursue a claim.

14. Unfair Dismissal

- A weeks pay increased to £475 (from £464) from 6 April 2015
- Max compensation award £78,335 (from £76,574)

Right to be accompanied

The revised Acas Code of Practice on disciplinary and grievance procedures that came into force on 11 March 2015 includes a minor amendment in this area reflecting a recent EAT judgment to the effect that an employee has an absolute right to request their choice of trade union representative or work colleague to accompany him/her at a disciplinary or grievance

hearing provided the request to be accompanied is itself reasonable i.e. the reasonableness requirement does not relate to the choice of companion.

15. Possible Post Election Changes

All the three political parties have proposed major changes to employment law if they are elected in May 2015. The major proposals are as follows:

Conservative party

- The introduction of a British Bill of Rights likely to replace the Human Rights Act 1998 and sever the formal link with the European Court of Human Rights (ECHR) so that the ECHR's judgements will no longer be binding on UK law.

- Small Business Enterprise and Employment Bill currently before Parliament will make exclusivity clauses in zero-hours contracts unenforceable and there is scope for provisions to impose financial penalties.

- Amendments to strike laws to halt where less than 40% support.

Labour party

- Increasing the national minimum wage to £8 per hour by 2020.

- Companies with more than 250 employees would be required to publish details of average pay of men and women at each pay grade to promote equality.

- Reform of the Employment Tribunal system including changing the fees and remission system.

- Cracking down on zero hours contracts including employer exclusivity and employers required to pay compensation to employees where shifts are terminated at short notice. Proposal to confer right to a fixed term contract after 12 weeks.

Lib Dem

- The creation of a new Workers' Rights Agency so that a single agency deals with the enforcement of workers' rights. The proposed agency would carry out work currently undertaken by HMRC, the Health and Safety Executive, the Employment Agency Standards Inspectorate and the Gang Masters Licensing Authority.

- An increase to the national minimum wage for apprentices.

- The introduction of an additional four weeks paternity leave.

- Reform of zero hours contracts including a ban on employer exclusivity clauses and right to request regular hours after a certain period.

- A requirement on companies with over 250 employees to publish their pay data to encourage fairness.

- Increasing the National Minimum wage.

UKIP

- Withdrawing from the jurisdiction at the ECJ.
- Want zero-hours workers to be offered fixed term contracts after a year.
- Want Agency Worker Regulations replaced.
- Giving employers the right to discriminate in favour of young British workers.

Disclaimer

This material and the talk does not give a full statement of the law. It is intended for guidance only, and is not a substitute for professional advice. No responsibility for loss occasioned as a result of any person acting or refraining from acting can be accepted by the author or Russell-Cooke LLP.

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