LEGAL UPDATE

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About us

The Charity and Social Business Team at Russell-Cooke works exclusively with the not for profit sector. We provide legal advice, training, governance support and consultancy across a full range of issues including organisational change.

The Team works with a broad range of organisations from national bodies like UNICEF, CFDG, ACEVO and Action for Blind People, campaigning and service delivering bodies including social care, environmental and educational organisations as well as a wide range of other types of bodies, professional and learned societies, Housing Associations through to newly formed and community based organisations. Advice includes:

- Governance and constitutional issues
- Property transactions
- Mergers, partnerships and collaborative working
- Employment
- Contracting
- Fundraising
- Tax
- Dispute resolution
- Trade mark and data protection
- Regulatory Issues

The Team consists of six partners, twelve professional staff who advise over six hundred charities. We are all personally committed to working for the sector. As well as advice, we undertake legal risk audits, training and seminars and produce publications and a monthly e-mail update.

Russell-Cooke has fifty two partners and over two hundred and seventy staff with offices in Central London, Putney and Kingston.

About the speaker

Jane Pendry is an Associate specialising in employment. She deals with contentious matters in the employment tribunal and also advises on all areas of non-contentious employment law. Jane joined the team in October 2012 after completing her training with Berwin Leighton Paisner LLP. Prior to commencing her training contract, Jane worked as a paralegal for two years with UNISON assisting with the focus on furthering the equal pay agenda through litigation and consultation on the Equality Act 2010.

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UNFAIR DISMISSAL

In this case, Ms Davies was dismissed for misconduct. In making their decision, the Council considered a previous written warning. Ms Davies said that the warning was wrong; she had not committed the alleged misconduct. She argued the validity of the warning should be considered as part of her unfair dismissal claim. The Court of Appeal disagreed. The Tribunal's role was to consider the fairness of the dismissal. This included deciding whether it was reasonable to rely on a previous warning but that did not mean deciding whether the warning should have been issued. Only in the exceptional case of bad faith or a manifestly inappropriate warning should a tribunal conclude it was unreasonable to rely on it.

Davies v Sandwell Metropolitan Borough Council UKEAT/0416/10

Legislative Changes

The Government has proposed to cap the compensatory element of the award for unfair dismissal at one years' pay. This means that the lower of the current cap of £74,200 for the compensatory award and a years' actual pay would apply.

The Ending of the Employment Relationship consultation document confirmed that the Government would not proceed with the proposal for compensated no-fault dismissal that was raised in the Beecroft report after the majority of businesses surveyed opposed the proposal.

REDUNDANCY

Legislative Changes

As of 6 April 2013 the following changes came into effect

- The minimum consultation period for 100 or more redundancies reduced from 90 to 45 days. The existing 30 day minimum period where an employer proposed making at least 20 redundancies will remain unchanged. The current 90-day maximum award for a "protective" award where an employer has failed to comply with its duty to consult will not be reduced and remains a punitive sanction.
- The expiry of fixed-term contracts which have "reached their agreed termination point" are now specifically excluded from collective consultation. Only those employees whose fixed-term contracts are about to end will be excluded. So, fixed-term employees whose contracts are not due to end will still need to be included.
- ACAS has produced new guidance on collective redundancy consultation.

In *USDAW and Others v WW Realisation 1 Limited (in liquidation) and Another* the Employment Tribunal had to consider whether the correct establishment for the purposes of the collective redundancy consultation rules was by the individual Woolworths stores or the entire retail operation.

It is established law that when considering the meaning of establishment both organisational and geographical factors should be considered. In this case the Tribunal found that the

establishment was the individual stores (thereby avoiding the collective redundancy regulations in some locations) on the basis that each shop was a physical distinct premises with its own organisation and purpose. The decision seems to contradict the broader interpretation in European case law and organisations are advised to apply caution in this area given the punitive nature of protective awards if the collective consultation regulations are breached.

However the union have appealed to the Employment Appeal Tribunal and guidance is expected later this year.

USDAW and Others v WW Realisation 1 Limited (in liquidation) and Another ET 3201156/2010

Although it has been held that the Tribunal should not interfere with an employer's redundancy selection decision where it has genuinely applied its mind to the selection process, in *Capita Hartshead Limited by Byard* the EAT made a finding of unfair dismissal where the organisation having lost a number of its clients made an individual redundant without pooling her for selection purposes with others carrying out similar roles. In this case there were a group of four actuaries and the fact that Mrs Byard had lost a number of clients was in no way attributable to her conduct and limiting the pool to one was unreasonable.

Capita Hartshead Limited v Byard UKEAT/0445/11

It will not however necessarily be unlawful to limit a pool to one. In *Halpin v Sandpiper Books Limited* the EAT confirmed that the appropriate pool is a question for the employer and in that case since the employer was proposing to cease its operations in China and Mr Halpin was the only employee in China, a pool of one was within the range of reasonable responses.

Halpin v Sandpiper Books Limited UK EAT 0171/11

A couple of cases have clarified the approach to selection for redeployment in a redundancy process and confirmed that an element of subjectivity is permitted in contrast with the objective approach required for the initial selection. In *Morgan v Welsh Rugby Union* the EAT held that when an employer was considering an employee for suitable alternative employment, it was entitled to appoint the best candidate for the job even if that assessment involved an element of subjectivity. In *Samsung Electronics (UK) Limited v Monte-d'Cruz* it was held that an employer will have flexibility when considering whether a person was suitable for a role and, if appropriate, it could involve the use of subjective selection criteria and interview. In *Mental Health Care (UK) Ltd v Biluan & Anor* the employer conducted a redundancy exercise comprising disciplinary and absence records and a competency assessment. In the vast majority of cases, it was the competency score that was decisive. The Employment Appeal Tribunal acknowledged that the employer took care of the process but considered that it chose a method which deprived it of the benefit of input from managers and others who knew the staff in question. The Employment Tribunal commented that whilst it is desirable to seek to avoid subjectivity and bias, this goal can come at "too high a price" adding that it is misplaced to fear that a Tribunal will find a procedure unfair only because there is an "element of subjectivity" involved.

Morgan v Welsh Rugby Union (2011) IRLR 376

Samsung Electronics (UK) Limited v Monte-d'Cruz (2012) UK EAT 0039/11

Mental Health Care (UK) Ltd v Biluan & Anor

WORKING-TIME REGULATIONS

Following European cases that established the right of employees to take annual leave during sickness absence and to re-arrange annual leave where sickness has occurred while on leave, a number of issues remained unresolved, including how long workers can carry forward untaken leave and whether a positive request to take annual leave has to be made during sickness absence.

In *KHS AG v Schulte* an employee had been on long-term sick leave for six and a half years when his employment was terminated and he claimed payment in lieu of several years' untaken holiday entitlement. A collective agreement provided that where an employee had been on sick leave any holiday not taken within 15 months of the end of the relevant leave year would be lost and the ECJ considered the lawfulness of this provision. It was held:-

- Carry-forward can be limited in time. If leave could be carried over indefinitely there would come a point when it would cease to be a genuine rest period as intended by the Working Time Directive.

- The carry-forward period must be substantially longer than the holiday year to which it relates but in this case a time limit of 15 months following the end of the holiday year was held to be lawful.

The ECJ took into account the ILO Convention on Annual Holidays With Pay which stipulates that holidays must be taken no later than 18 months from the end of the leave year it accrues in. Organisations considering including a time limit in their sickness policies may consider an 18 month limit safer than 15 months though the latter was accepted in this case.

In *NHS Leeds v Larner* the Court of Appeal held that an employee is not under an obligation to request their annual leave for it to accrue during sickness absence and that unused annual leave can be carried over into the next leave year regardless of the prohibition in the Working Time Regulations and words should be read into the Regulations in order to allow this.

KHS AG v Schulte [2011] Case C-214/10 ECJ

NHS Leeds v Larner (2012) EWCA Civ 1034

DISCRIMINATION

Race Discrimination

In *Royal Bank of Scotland plc v Morris* the EAT held that a Tribunal had been entitled to find that it was discriminatory for a manager to assume that a black employee who raised a complaint about tension between himself and a colleague was raising a complaint related to race. The assumption was based on a stereotype, namely that a black employee

complaining about his treatment by a white colleague must be alleging race discrimination and, insofar as the assumption caused a detriment to the employee, it amounted to less favourable treatment on the grounds of race. This provides a warning to employers that while being alert to complaints that must be properly investigated, assumptions should never be made based on the possession of a protected characteristic.

Royal Bank of Scotland plc v Morris EAT 0436/10

Sex Discrimination

In *Crilly v Ballymagroarty Hazelbank Community Partnership* an Industrial Tribunal in Northern Ireland found that a requirement for a job candidate to have two years' paid work experience within the previous five year period had a disproportionate adverse impact on women and constituted sex discrimination. The requirement could not be justified on the basis that the person appointed would have to "hit the ground running" as the requirement would have been satisfied by a candidate who had had no paid employment in the three years prior to the job starting date.

Crilly v Ballymagroarty Hazelbank Community Partnership 242/11

Disability Discrimination

In *Salford NHS Primary Care Trust v Smith* the EAT considered whether reasonable adjustments would have included providing non-productive rehabilitative work or offering a career break to an employee off sick due to chronic fatigue syndrome. The EAT emphasised that reasonable adjustments were limited to those that were primarily concerned with enabling the disabled employee to remain in work or return to work and that neither of the adjustments sought would have had this effect.

Salford NHS Primary Care Trust v Smith EAT 0507/10

The Employment Appeal Tribunal in this case held that the Employment Tribunal had adopted the wrong approach in focusing on what Mr Aderemi was able to do, rather than on what he could not do, which was the correct test. The Employment Appeal Tribunal also held that standing for long periods at work was a normal day to day activity. In the Judge's view it would not be difficult to think of many jobs in which standing for long periods was necessary. Finally, in assessing disability under the Act, Tribunals should not defeat the purpose of the legislation by placing an over-emphasis on the label to be attached. Essentially the Tribunal should apply a broad approach to the definition of a normal day to day activity. This case serves as a useful reminder that organisations should tread very carefully when considering what an employee's limitations are and that many activities will be considered day to day activities for the purposes of the definition of disability.

P Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12

Religious Discrimination

Four Christian employees whose religious discrimination claims failed in the UK had their cases heard by the European Court in September 2012**.** *Eweida and Chaplin* brought claims

of indirect religious discrimination against their employers on the grounds that their workplace uniform policy prevented them from wearing a visible cross at work. The cases had been rejected in the UK on the basis that the Claimants failed to show that the requirement not to wear a cross put others at a similar disadvantage. The Claimants argued in the European Court that the UK has failed to give effect to Article 9 of the European Convention relating to freedom of thought, conscience and religion by adopting too restrictive an approach to the manifestation of religion and belief at work and by placing too much emphasis on the fact that employment is freely accepted by an individual who chooses to accept a particular job. The court held that in Ms Eweida's case a fair balance was not struck and that while BA's wish to project a certain corporate image was legitimate, Ms Eweida's cross was discrete and would not have detracted from her professional appearance. Nor was there any evidence that employees wearing other items of religious clothing had negatively impacted on BA's brand. It held in failing to provide Ms Eweida with a remedy the UK had failed to protect her right to manifest her religion, in breach of its obligation under the European Convention. However Ms Chaplin's case was not upheld. The court accepted the Trust's argument that its restriction on jewellery was to protect the health and safety of nurses and patients and in the circumstances the interference with her freedom to manifest her religion did not violate her convention rights.

In *Ladele* the Court of Appeal had held that a civil registrar who was required to perform civil partnership ceremonies had not been discriminated against on the grounds of her Christian religion. Her employer the London Borough of Islington succeeded in objectively justifying her treatment as a proportionate means of achieving a legitimate aim, namely Islington's overarching policy of being committed to the promotion of equal opportunities and requiring all employees to act in a way that did not discriminate against others. The European Court felt that Ms Ladele's case was one of freedom of conscience rather than freedom of religion and that her objection should have been respected and the Council should have allowed her not to conduct civil ceremonies. However her claim was rejected on the basis that the Council's requirement pursued a legitimate aim and was proportionate as it aimed to secure the rights of others which are also protected under the European Convention.

In *MacFarlane* the EAT held that a Relate counsellor had not been discriminated against on the grounds of his Christian religion when he was dismissed for refusing to provide counselling services to same sex couples. The EAT held that Relate's treatment could be objectively justified as a proportionate means of achieving a legitimate aim of providing a full range of counselling services to all sections of the community regardless of a sexual orientation. This claim was also rejected by the European Court.

Commentators believe that this case will have a significant impact on UK law in this area. In particular Ms Eweida had failed in her claim in the domestic court because she struggled to established "group disadvantage." However the ECHR emphasised that religious freedom is primarily a matter of individual thought and conscience and it is likely that Tribunals will place less emphasis on the group in the future and where a Claimant establishes disadvantage, will go straight to considering justification. Further the ECHR's emphasis on freedom of conscience and thought is likely to continue the trend for religion and belief in the Equality Act to be expanded to include employees' political beliefs and lifestyle choices.

Eweida and Others v United Kingdom (2013) ECHR 37

A recent EAT case has considered whether a Christian worker was indirectly discriminated against by her employer's requirement that all care workers work some Sunday shifts. The Claimant worked as a Residential Care Officer at a children's home which was open 7 days per week. Her contract stated she could be required to work on Sundays but for two years her employer had accommodated her wish not to work on Sundays as a practising Christian by allowing her to work every Saturday. Eventually the employer insisted that she work on occasional Sundays in accordance with her contract. She refused to do so and having received a final written warning resigned and brought an indirect religious discrimination claim. The EAT upheld the Tribunal's decision that she was not indirectly discriminated against and found that the Tribunal had been entitled to find that the requirement was a proportionate means of achieving legitimate aims of ensuring an appropriate gender and seniority balance on each shift, cost-effectiveness, fair treatment of all staff and continuity of care for the children at the home.

MBA v The London Borough of Merton UK EAT/0332/12

Age Discrimination

The long-running retirement case of *Seldon v Clarkson Wright and Jakes* has established the law on justification of direct age discrimination under the (now repealed) Employment Equality (Age) Regulations 2006 and will be applicable to justification arguments under the Equality Act. The case concerned a law firm which required its partners to retire at age 65. Since the partners were not employees the law firm could not rely on the default retirement age under the previous Regulations and had to objectively justify the use of the retirement age as a proportionate means of achieving a legitimate aim. The Supreme Court held as follows:-

1. In order to justify direct age discrimination, a clear social policy aim is required.
2. ECJ case law has identified two different kinds of legitimate social policy aims: inter-generational fairness and preserving the dignity of older employees.
3. The aim relied on must be legitimate given the particular circumstances of the employer. For example if the stated aim is to enable the recruitment of younger employees, this will not be legitimate if the employer has no difficulty recruiting younger workers.
4. The employer's actions must still be an "appropriate and necessary" means of achieving the aim. If there are less discriminatory ways of achieving the same aim, then the treatment is unlikely to be justified.

The Supreme Court stressed that the chosen retirement age of 65 needed to be considered in the context of each stated aim and objective, in this case staff retention and workforce planning, together with expelling partners without the need to resort to performance management procedures. The case has been remitted to the Employment Tribunal to consider.

Seldon v Clarkson Wright and Jakes 2012 ICR

Indirect Age Discrimination

In *Homer v Chief Constable of West Yorkshire Police* Mr Homer was required to have a law degree in order to be promoted to a higher level and pay grade under a newly introduced pay structure. He brought an indirect age discrimination claim based on the fact he would have been unable to complete the course prior to reaching the police force's retirement age of 65. The Supreme Court held that Mr Homer had been put at a disadvantage by the provision which would amount to indirect discrimination if not objectively justified. In relation to objective justification the court held:-

1. A wider range of legitimate aims can justify indirect discrimination (compared to direct discrimination).

2. A legitimate aim need not be a social policy reason but could be a need relating to the employer's business. The Tribunal should weigh the discrimination against the employee's requirements.

3. A three stage test should be applied (i) is the objective sufficiently important to justify limiting a fundamental right (ii) is the measure rationally connected to the objective and (iii) are the means chosen no more than is necessary to accomplish the objective.

The case was remitted to the Tribunal to determine whether the discrimination was justified.

Homer v Chief Constable of West Yorkshire Police 2012 ICR 704

The question of whether cost alone can provide objective justification has still not been resolved. In *Woodcock v Cumbria Primary Care Trust* the Court of Appeal held that an employee's redundancy dismissal, the timing of which was intended to avoid the cost of an enhanced pension if he was still employed at age 50, was objectively justified direct age discrimination. The court accepted the timing was not served simply to avoid cost but with the aim of giving effect to the employer's genuine decision to terminate the employment on the ground of redundancy. The timing was objectively justified as the avoidance of providing a windfall to the employee provided additional justification.

In *HM Land Registry v Benson and Others* the EAT held that the employer's decision not to select employees aged 50 to 54 for voluntary redundancy/early retirement because this would be too expensive was objectively justified. It held that the employer was entitled to set a budget for a reduction in head count and the selection criteria of cheapness in order to release as many employees as possible within the budget, was a proportionate means of achieving that aim. The Tribunal had found that the case fell within the "cost plus" category on the basis that while cost was the only criterion used to make the initial selection, there was an adjustment to ensure the retention of skills and the balance between the grades of employees following selection. The EAT did uphold another employee's claim that the decision to exclude employees from the scheme who were on a career break was unjustified indirect sex discrimination because they had not been given the opportunity to return early to take advantage of the scheme.

Woodcock v Cumbria Primary Care Trust 2012 ICR 1126

HM Land Registry v Benson and Others 2012 ICR 627

TUPE

Important cases in 2012

In *Hunter v McCarrick* it was established that TUPE does not apply on a change of service provision where following the change the services are provided to a new client.

McCarrick was employed by W to manage a property portfolio. The managing director of W was Mr Hunter. The mortgagee of the property portfolio in due course appointed property receivers to assume control of the properties and they appointed a new property management company. McCarrick did not become employed by the new company but by Mr Hunter who assisted the new company with the provision of the property management services. Later he was dismissed by Mr Hunter and sought to establish continuing employment. Both the EAT and the Court of Appeal rejected McCarrick's claims holding that in order for there to be a service provision change the client had to remain the same and therefore the change to providing services to the receivers excluded the application of TUPE. Note that even if there is no service provision change, TUPE could still apply if there has been a transfer of a part of the business.

Hunter v McCarrick 2012 ICR 533

A number of cases have established a more restrictive application of TUPE to changes of service provision. In *Eddie Stobart Limited v Moreman and Others* the company provided warehousing and distribution services to two clients. The employees were organised as day shift and night shift but were not organised in relation to the client. When one of the contracts was awarded to a new service provider the company took the view that the day shift employees were assigned to that client and this was rejected by the new service provider. The EAT endorsed the Tribunal's finding that the claimant employees were not an organised grouping of employees and thus the service provision change provisions were not applicable. It was held that an organised grouping could not be a group who, without any deliberate planning, simply happened to work for a particular client. It was essential that the employees were organised by reference to the requirements of the client in order to trigger the service provision rules.

Eddie Stobart Limited v Moreman and Others 2012 ICR 919

Similarly in *Seawell Limited v Ceva Freight (UK) Limited and Another* CF provided warehousing services to clients and organised its workforce into two teams, one for inbound goods and one for outbound. The Claimant worked in the outbound team which comprised eight employees and spent 100% of his time working on the account for S. The other seven employees in the outbound team spent up to 30% of their time on the S account. When S brought the work in-house, CF argued that TUPE applied so as to transfer the Claimant's employment to S. The Tribunal accepted the argument but the EAT disagreed holding that the Tribunal had focused too much on the amount of time spent by the Claimant on the contract for S which was not the correct approach. Rather an organised grouping of employees must involve a deliberate putting together of a group of employees for the purpose of the relevant client's work. In this case the outbound team did not have carrying out activities for S as its principal purpose i.e. there was a difference between the Claimant's principal purpose and that of the group within which he worked. S had taken back in-house all aspects of the work formally carried out by CF, not only those aspects that the Claimant performed and consequently TUPE was excluded.

Seawell Limited v Ceva Freight (UK) Limited and Another (2012) IRLR 802

In *Johnson Controls Limited v Campbell and Another* C was employed by Johnson as a taxi administrator taking bookings for taxis from clients including the UK Atomic Energy Authority (UKAEA) he also carried out other administrative tasks but 80% of his time was taken up by the taxi activities for UKAEA. When UKAEA decided to stop using Johnson for taxi bookings and instead use its own secretaries to book taxis directly with taxi firms the Tribunal had to consider whether there had been a change in service provision. The EAT confirming the Tribunal's approach and held that the centrally coordinated service that had been carried out by Johnson no longer existed after UKAEA started booking taxis directly with them. It held that identifying an activity requires a holistic assessment, in this case, the service was the centralised and coordinated work for clients which was not the same as the activity UKAEA took in-house and therefore the service provision change rules did not apply.

Johnson Controls Limited v Campbell and Another UK EAT/004/12

A number of cases have established that in order for the service change provisions to apply the activities carried out post transfer must be the same as pre-transfer. In *Enterprise Management Services Limited v Connect-Up Limited and Others* the EAT held that a 15% reduction in work and the fact that the re-tendered service was fragmented among a number of different contractors excluded the application of TUPE.

Enterprise Management Services Limited v Connect-Up Limited and Others 2012 IRLR 190

Under the TUPE 2006 Regulations there will be no service provision change where the client intends that the activities being contracted for will be carried out "in connection with a single specific event or task of short-term duration." Whether such activities had to be both "single specific" and "of short-term duration" was uncertain but in *Liddell's Coaches v Cook and Others* the EAT held that a single specific event is, by definition, of short-term duration and therefore the phrase should be read together. However what is short-term and long-term will vary. In this case a one-year contract to transport school children to neighbouring schools while their school was re-built was characterised as short-term and falling within the TUPE exclusion as transport contracts were generally awarded by the local authority for three to five years.

The SPC rules do not apply where the activities concerned consist wholly or mainly of the supply of goods rather than services for a client's use. In *Pannu and Others v Geo W King Limited (in liquidation) and Others* the EAT held that this exclusion applied to a group of employees who worked on an assembly line making parts which their employer sold to a manufacturing client.

Liddell's Coaches v Cook and Others EATS 0025/12

Pannu and Others v Geo W King Limited (in liquidation) and Others 2012 IRLR 193

In what may be an important case the EAT has held in *Edinburgh Home Link Partnership and Others v City of Edinburgh Council and Others* that two directors were not assigned to the organised grouping of employees providing services for TUPE purposes when the Council took those services back in-house, on the basis that their roles were largely strategic, involving the maintenance of the organisation itself and they were not directly involved in the front-line delivery of services.

Edinburgh Home Link Partnership and Others v City of Edinburgh Council and Others EATS 0061/11

In the *London Borough of Islington v Bannon and Another* concerned the expiry of a contract let by the London Borough of Islington to CSV for the provision of children's care visitors. When the original contract expired, Islington ran the service after Action for Children (AFC) withdrew its tender. In running the service Islington operated on a skeleton staff for six months until AFC took over. The Claimant was dismissed by CSV by reason of redundancy and she claimed unfair dismissal on the basis that there had been a service provision change. The Employment Appeal Tribunal upheld the Employment Tribunal's finding that there had been a change of service provision even though Islington's running of the service had been unplanned. Islington appealed on the basis that the skeleton service they ran for six months was not fundamentally or essentially the same as that carried out previously by CSV. The EAT confirmed that in considering whether transferring activities are fundamentally or essentially the same they are not required to be identical and that as the purpose of the original contract with CSV was to discharge Islington's statutory duty to provide the children's care visitor service, this service had transferred as Islington had ensured there was a continuous provision of service albeit scaled-down and no organisation other than Islington were performing any of the prior activity. The fact that Islington did not have the capacity or resources to continue to provide the service to the same standard was not relevant.

London Borough of Islington v Bannon and Another UK EAT 0221/12

Where TUPE applies all employment terms and conditions transfer except occupational pension. However case law has established that collateral benefits under a pension scheme such as the right to early retirement due to sickness will transfer. In *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA and Another,* the High Court held that an employee's expectation of being fairly treated in exercising his or her entitlement to be considered for early retirement benefits constituted a liability that transfers under TUPE. What transferred was the discretionary power to provide those benefits which the transferee had to exercise in good faith. However the transferee inherited liability for the early retirement benefits themselves only to the extent that there was no duplication of pension benefits under the transferor's scheme. The court also held that pension benefits payable after the employee's normal retirement age were "old-age benefits" for TUPE purposes i.e. excluded regardless of the fact that they became payable as early retirement benefits before the employee reached that age. Therefore liability for such benefits did not pass to the transferee. An appeal against the High Court decision will be heard by the Court of Appeal this year but it is vital that transfer agreements include appropriate indemnities in relation to the transfer of collateral benefits of this type.

Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA and Another 2012 IRLR 733

Forthcoming Changes

The Government has issued a consultation on proposed changes to TUPE 2006 which will close in April this year with an intention to bring in changes in autumn this year. One

proposal is the repeal of service provision change coverage though the Government has stated that there will be a lead-in period.

The Government has also indicated willingness to legislate to permit post-transfer harmonisation of terms and conditions. While changes by reason of the transfer will still be prohibited in order to comply with European law, the parties would be able to agree any change they could have agreed had there not been a transfer and agree a variation for economic, technical or organisational reasons. Other changes include limiting unfair dismissals to those by reason of the transfer and not merely "connected" to the transfer and to amend the definition of ETO reasons "entailing changes in the workforce" to include changes in workforce location and narrow the scope of the right for employees to resign in response to changes to their material detriment consequent on transfer and be treated as dismissed.

In addition the government is seeking views on whether a transferor should be able to rely on a transferee's ETO reason and allowing a transferee to consult transferring employees on redundancy pre transfer.

Social Media

In ***Smith v Trafford Housing Trust*** the High Court held that a manager was unlawfully demoted for posting his views on same-sex marriage on Facebook. This is an important case as far as it relates to the question of identifying where work life ends and social/private life begins. Mr Smith Facebook page was visible to his "friends" who included work colleagues. The identity of his employer was also visible. He was disciplined under the Trust's disciplinary policy which included a requirement not to engage in "activities which may bring the Trust into disrepute either at work or outside work" and included an express reference to "any web-based media such as a personal blog, Facebook, YouTube or other such site."

The court did not consider the comments amounted to misconduct or brought the Trust into disrepute because it was clear they were not made on the Trust's behalf they were expressed in a moderate way and he was not seeking to foist his views onto others. The case highlights:-

1. The limits on an employer's ability to police the behaviour of its employees outside work, all will depend on the precise circumstances;
2. The difficulty in identifying the demarcation line between work and personal life;
3. The need for careful drafting of policies on which an employer may seek to rely.

Smith v Trafford Housing Trust 2012 EWHC 3221

Volunteers

In a case of importance to the sector the Supreme Court ruled in ***X v Mid Sussex Citizens Advice Bureau and Others*** that a volunteer was not covered by the Disability Discrimination Act (now repealed) as she did not qualify as an employee or a worker. She was not undertaking a work placement and so could not claim under the provisions relating to work placements nor was she on a programme that might be used to decide whether she

should be given paid work. While the contrary decision would have impacted widely on the sector, organisations need to be mindful that a court could come to a different decision where individuals are receiving tangible benefits in return for work experience, notably the opportunity of paid work and even if unpaid, internships will not necessarily be safe from attack.

X v Mid Sussex Citizens Advice Bureau and Others [2011] EWCA Civ 28

LOOKING AHEAD

Family Friendly Rights

Parental Leave

On 8 March 2013 the entitlement to unpaid parental leave increased from 13 to 18 weeks per child. Separately from 2015, each parent will have the right to take the unpaid parental leave at any time until their child's 18th birthday.

Flexible Working

The Government has announced that it will extend the right to request flexible working to all employees from spring 2014. The Government has confirmed:-

- The right will apply to employees who have completed 26 weeks continuous service.
- Employees will only be able to make one request in a 12 month period.
- The statutory procedure will be replaced with a duty to deal with requests "reasonably" with a Code of Practice from ACAS on what this means and
- ACAS will produce a separate guidance on dealing with competing flexible working requests and the discrimination risks.

Shared Parental Leave

A new system of shared parental leave will be introduced in 2015 under which:-

- Mothers will remain entitled to up to 52 weeks of maternity leave.
- Fathers will remain entitled to two weeks ordinary paternity leave.
- Mothers can take 50 weeks of their maternity week as "shared parental leave" which could be shared with the father.
- Shared parental leave can be taken by the parents concurrently, consecutively or in alternate blocks provided the leave is taken in blocks of at least a week.
- The pattern of leave must be agreed by both parents' employers otherwise it must be taken by each parent in a single block.

- No more than 52 weeks and 39 weeks statutory pay can be taken in total between the couple.

- Fathers (or the mother's partner) will have a new right to take unpaid leave to attend two ante-natal appointments.

- Shared parental leave will apply equally to adoptive parents and parents of children born through surrogacy.

Whistleblowing

The Enterprise and Regulatory Reform bill that is going through Parliament will add a "public interest" test for whistleblowing claims. The change will mean that for a whistleblowing claim the claimant will be required to show that he or she believed that their disclosure was made in the public interest and that their belief was reasonable in the circumstances. This amendment is directed at avoiding the effect of the 2002 ***Parkins v Sodexho*** case that held that breach of a legal obligation for whistle-blowing purposes can potentially cover a disclosure relating to a breach of the employee's contract of employment.

Additionally the Government have tabled an amendment to remove the "good faith" requirement to establish a protected disclosure in whistleblowing cases. Instead, a tribunal will have a new power to reduce compensation by up to 25% if the disclosure was not made in good faith and the tribunal considers it just and equitable in the circumstances to do so.

Finally, employers will be vicariously liable where its employees victimise a whistleblowing colleague. Detrimental acts of one co-worker towards another who has blown the whistle will be treated as being done by the employer, therefore making the employer responsible. This will be subject to a defence that the employer took all reasonable steps to prevent the detrimental treatment of a co-worker towards the whistleblower.

Pre-claim conciliation

From spring 2014, there will be a requirement for most types of potential tribunal claims to be lodged with ACAS in the first instance. ACAS will offer parties the opportunity to engage in early conciliation in an attempt to resolve disputes without recourse to an employment tribunal. Under a two-stage process, a potential claimant will be required to fill in an early conciliation form. The ACAS office will be required to make "reasonable efforts" to contact the claimant to obtain the details. If the claimant does not wish to participate in early conciliation after they have been contacted, ACAS will issue a certificate confirming the claimant complied with their duty to contact ACAS. Where the claimant does wish to participate in early conciliation, the ACAS case worker will pass the matter to a conciliator who will then contact both parties. If the respondent does not wish to participate, the conciliator will immediately issue the compliance certificate. If the respondent does agree, the conciliator will have up to one calendar month (which can be extended by two weeks) to facilitate a settlement.

Termination Agreements

From summer this year, compromise agreements will be renamed “settlement agreements” and employers will be given more freedom to have discussions with employees about a proposed settlement outside the context of an existing dispute.

The Employment Tribunal, when considering the fairness of a dismissal, will be prevented from taking into account any offer or settlement discussion held with a view to terminating employment. The new statutory provision will enable an employer to raise a performance or capability issue and include within that discussion a proposal to end the employment relationship on negotiated terms. That conversation would then not be able to be used as evidence that a subsequent decision to dismiss was predetermined, regardless of procedural obligations, in later ordinary unfair dismissal proceedings. However, the statutory provision will only prevent what is stated in the settlement offer, or during discussions about it from being admissible in ordinary unfair dismissal proceedings. Additionally, no “undue pressure” can be placed on the employee and the provision will not apply where the employer’s behaviour has been “improper”. ACAS will produce a code of practice which will set out a non-exhaustive list of what might constitute “improper behaviour” and “undue pressure”.

Employment Tribunal Reforms

From this summer, fees will be introduced into the employment tribunal system. Broadly, fees will be charged at two stages:

1. upon issue of the claim; and
2. before the hearing.

Those on low incomes will be excused payment. Tribunals will be given a discretionary power to order the losing party to reimburse any fees paid to the successful party.

The level of fee will depend on the nature of the claim. Level 1 claims, covering disputes over matters such as unauthorised deductions from wages and unpaid redundancy payments, will be subject to a £160 issue fee and £230 hearing fee. Level 2 claims, which include claims for unfair dismissal, discrimination, equal pay and whistleblowing will be subject to a £250 fee and £950 hearing fee. In addition to the two main charging points, there will also be specific fees for making certain applications or for judicial mediation.

Employee shareholders

The Government are proposing a new form of employment status where employees will give up employment rights in return for shares in the business. The changes were due to come into force in April this year but have been defeated by the House of Lords and therefore implementation is at present uncertain subject to a further reading in the House of Commons. The Government has confirmed that:-

- Employee shareholders must be given shares worth at least £2,000.
- First £2,00 of shares will be exempt from income tax and NIC.
- The shares will be exempt from Capital Gains Tax up to £50,000.

- Employee shareholders will give up their unfair dismissal rights except where the dismissal is discriminatory or automatically unfair.
- Employee shareholders will give up their rights to statutory redundancy pay, the right to request training and the right to request flexible working except where the request is made on return from parental leave.
- Employee shareholders who take maternity, adoption or additional maternity pay will be required to longer notice if they wish to return early (16 weeks instead of 8 weeks).
- It will up to the parties to agree on whether and under what conditions the employee shareholder will have to give up shares if they resign or are dismissed.

The shares can come from the employer or its parent company and can be issued by an overseas company.

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 authors or Russell-Cooke LLP.

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