Employment Club Update

November 2010

More TUPE 'Headaches' for Employers and Service Providers

The ECJ has made an important decision under the Acquired Rights Directive which is implemented in the UK via the Transfer of Undertakings Regulations (TUPE). It now seems inevitable that domestic Employment Tribunals will have to extend the automatic transfer provisions of TUPE to non-contractual as well as contractual employment relationships.

The European Court of Justice has effectively ruled that employees of Business A who are judged to be permanently assigned to Business B will transfer to Business C if the business of Business B transfers to Business C, even if there are no contracts of employment between the employees and Business B. Those making acquisitions of companies within group structures should be particularly aware of the new provisions.

The EAT has also been adjudicating over the complexities of TUPE. In the case of Wood v London Colney Parish Council a bar steward was dismissed after a social club handed back it's Lease and surrendered it's premises license. The bar was later re-opened by a second respondent which employed its own bar staff.

The EAT held that the employee was entitled to transfer to the new employer under TUPE as the economic entity continued to exist despite the temporary cessation. Whilst the case does not create new law it is a reminder of the far reaching nature of the TUPE regulations.

ACAS Settlement Warning

Employers often settle disputes using ACAS who will often facilitate the negotiation of a binding COT3 compromise agreement containing confidentiality provisions and other clauses to protect the employer. However, all of the terms must be specifically agreed.

In a recent case a consultant acting for an employer offered a settlement of £1,000. The solicitor for the employee unequivocally accepted the offer without discussion of the 'usual' clauses incorporated by ACAS into the agreement. The agreement was binding from the time of acceptance and the 'usual' clauses could not be included after agreement was reached. The settlement sum should have been concluded 'subject to contract'.

Scope of Employment

An employee who stole silver bars from his employer has been held to have been acting in the scope of his employment whilst he committed the theft.

The employee was employed to fumigate the container holding the silver and accessed them in accordance with Company procedure.

The Court of Appeal held that the theft could be regarded as reasonably incidental to the purpose for which the employee was employed.

Because the employee was acting within the scope of his employment at the time of the theft, the employer was vicariously liable to third parties for the loss of the silver bars.

Equality Act Codes of Practice

The Equality and Human Rights Commission has produced statutory codes of practice on Equal Pay, Employment and Services, Public Functions and Associations.

The Codes were laid before Parliament on 12th October and remain in draft form when they will enter into force providing no objection is made for 40 days.

The Codes are an invaluable source of general information for anyone dealing with employment matters but are not law and employers should continue to seek proper legal advice as to how the Equality Act 2010 will be applied in particular factual circumstances.

'Continuity of Employment' Ruling

A teacher's continuity of employment was not broken by the summer holiday break even when he returned after the summer recess under a new contract with the same independent college.

The EAT held that the summer holiday was merely a 'temporary cessation' within the period 25th April 2008 to 12th June 2009. There was no requirement that the teacher should have expected to return to work after the summer break.

No Right to Choose Tribunal

The EAT has held that a party to employment tribunal proceedings has no right to choose which Tribunal hears the proceedings. By convention proceedings are heard by reference to the postcode of the Claimant's place of work but this is only the practice and not a rule. The Tribunal in the case before the EAT had ordered that 4 conjoined cases from different Tribunal regions be heard together.

These notes are for guidance purposes only. We believe the contents to be correct but it should not be taken as sufficiently accurate or full to apply in any specific situation without first referring to us. We would be pleased to advise on any specific issues or problems.

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