



EMPLOYMENT LAW UPDATE

December 2011

Welcome to the December issue of the Moore Blatch Employment Law Update. This monthly bulletin will keep you updated with the latest happenings and legislative changes in the world of employment law.

Dismissal for Conduct or Capability reasons?

The Employment Appeal Tribunal (EAT) recently found (in the case of *Screene v Seatwave*) that an employment tribunal is entitled to find that an employee has been fairly dismissed for a different statutory reason to the one relied on by the employer.

Mr Screene was employed as a financial controller by Seatwave (the 'Employer') and was responsible for monitoring the Employer's German bank account. Following a disciplinary investigation and hearing, Mr Screene was summarily dismissed for being grossly negligent in failing to spot a fraud (which resulted in the employer losing approximately £1.7m from its German bank account). Mr Screene brought a claim for unfair dismissal, on the basis that it was unfair for the Employer to dismiss him for misconduct. The employment tribunal found that the employee's negligence amounted to gross misconduct and that the dismissal was fair.

Mr Screene appealed to the EAT arguing that the Tribunal had substituted its own reason for dismissal (conduct) in place of the employer's pleaded reason (capability) and, as a consequence, failed to consider the relevant law in relation to a capability dismissal.

The EAT dismissed the appeal stating that the employee had suffered no prejudice on the basis that the decision to dismiss, whether it was for conduct or capability, was founded on exactly the same set of facts. It went on to state that a tribunal is entitled to make its decision on what it considers to be the real reason for dismissal, provided the claimant is not prejudiced as a result.

This case is a useful reminder that, providing the claimant will not be prejudiced as a result, an employment tribunal is entitled to find that the reason for a dismissal is one other than that relied on by an employer. An employer who states that the reason for dismissal was different to the one found to have applied by the Tribunal will not for this reason alone be seen to have dismissed unfairly.

EAT is asked to reach a decision as to whether post-transfer changes to the terms of an employment contract were connected with the TUPE transfer

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) the dismissal of an employee, either before or after the transfer of their employment to a new employer will be automatically unfair. This is the case where the sole or principal reason for the dismissal is either the transfer itself; or a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce (an ETO reason).

In the case of *Enterprise Managed Services Ltd v Dance & others* the EAT was asked to consider whether employees who transferred under TUPE were dismissed because they did not agree to changes to their terms of employment. If this was the case their dismissal would automatically be unfair.

Enterprise Managed Services Ltd (EMS) and Williams provided maintenance services to Modern Housing Solutions (MHS) under separate services contracts. MHS informed EMS and Williams that, on the expiry of their current contracts, there would be a single contract for appliance and building maintenance services awarded to one of them on the basis of which was able to provide the services at a reduced cost with improved service delivery, efficiency and productivity.

Prior to the expiry of its contract with MHS, EMS reviewed the terms of employment of its engineers working on the MHS contract (EMS engineers). They proposed the introduction of performance-related pay and different hours. After consultation, the changes were agreed with all the EMS engineers. Williams did not change the terms of employment of its engineers who worked on the MHS contract (Williams engineers).

EMS was then awarded the contract by MHS and the Williams engineers subsequently transferred to EMS under TUPE.

After the transfer and in order to meet MHS' productivity requirements, EMS decided that it would need to introduce performance-related pay for the Williams engineers it had inherited. The Williams engineers refused to accept the changes and as a result they were dismissed. They subsequently brought claims in the employment tribunal for automatic unfair dismissal for a reason connected with the transfer of their employment. EMS argued that the dismissals were for "sound business reasons" and were not connected with the transfer.

The employment tribunal held that the transfer was the sole or principal reason for the dismissals. However, it also found that the changes were driven by the success of pre-transfer changes to existing employees' terms in order to improve productivity.

EMS appealed to the EAT arguing that the decision to vary the terms of the Williams engineers was driven by the need for productivity. Although the EAT considered that the changes were not transfer-related, it remitted the case to a fresh employment tribunal to consider the facts fully.

It will be interesting to see whether future decisions follow a similar approach to the above case. Employers have come to accept that it is difficult to change terms of employment to achieve harmonisation following a TUPE transfer and that any attempt to do so will either be found to be void or will entitle employees to claim unfair dismissal. Until we see what approach future tribunals take we would recommend that employers still approach post-transfer variations to terms of employment with caution.

What is a workers entitlement to Holiday Pay if they take or seek to take holiday.

In the case of *Fraser v St George's NHS Trust*, the EAT considered whether workers have the right to statutory holiday pay under the Working Time Regulations 1998 (WTR 1998) in respect of accrued but untaken holiday when their employment terminates.

In this case the employee was injured at work and was on sick leave for four years until her dismissal. For the last two years of her employment she received no pay. On the termination of her employment she claimed for 4 weeks holiday pay in relation to each of those two years. Her employer argued that if she wanted to exercise the right to paid holiday she had to give notice to the employer, which she had not. The employee subsequently brought a claim before an employment tribunal and the Tribunal agreed with her employer's argument and rejected her claim. She appealed to the EAT.

The EAT accepted the employers argument stating that workers are only entitled to statutory holiday pay under the WTR 1998 if they have taken the leave to which the pay relates or given notice to their employer in accordance with the WTR 1998 that they wish to take such holiday. The EAT went on to state that it would go against the purpose of the WTR 1998 if workers could receive statutory holiday pay whether they took time off or not, as this would create a financial incentive for them not to take holiday. The EAT noted, however, that workers on long-term sick leave do not necessarily relinquish their untaken statutory holiday entitlement at the end of each leave year.

The employee was unsuccessful for the following reasons:

- The policy of the WTR 1998 is that workers should take annual holiday in the interests of their health and welfare. If workers were not entitled to be paid while taking statutory holiday, then they would be discouraged from exercising their entitlement.
- It cannot be right for workers to receive statutory holiday pay where they have not taken holiday as if they did this would create an incentive not to take holiday (contrary to the purpose of the legislation).
- Under the WTR 1998 the general rule is that workers should use their statutory holiday entitlement before the end of the relevant leave year or they lose their entitlement and cannot be paid in lieu of it.

The EAT confirmed that a worker on sick leave had a choice, they can either take statutory holiday and be paid for it while they are off sick or they can request that their holiday is deferred. The Employee in this case did not request that her holiday was deferred and as a result her entitlement to statutory holiday lapsed at the end of each leave year. The EAT were of the view that if she had requested to defer her holiday then the trust might have been obliged to agree to that request.

The Employee went on to argue that, if she had been obliged to give notice under the WTR 1998 to receive holiday pay, then the employer was in breach of contract for failing to tell her this. Rejecting this argument, the EAT held that her right to take statutory holiday arose "as a matter of general law and not of contract" and that there can be no duty on an employer to advise employees of their rights under general law.

Whilst the above decision by the EAT appears to provide a warning to workers who work throughout a leave year; that they are not only likely to lose that year's statutory holiday entitlement but are also unlikely to receive a payment in respect of that entitlement when their employment terminates; I would draw your attentions to the article 'Unlimited accumulation of annual leave during sick leave?' below it warns that the entitlement to paid holiday cannot be undermined by imposing conditions that are difficult to meet.

Unlimited accumulation of annual leave during sick leave?

It is established that under the Working Time Directive (Directive) workers on long-term sick leave accumulate holiday (*Stringer v HMRC*).

However in *KHS AG v Schulte* the ECJ confirmed that this right is not without limits, and that to allow workers to accumulate unlimited amounts of holiday entitlement, or pay in lieu, does not reflect the purpose of the Directive. The ECJ have now confirmed that accrual of annual leave does not continue indefinitely.

Schulte worked for KHS AG until, in 2002, he had a heart attack, which left him unable to work. Schulte received an invalidity pension until the end of the employment relationship in 2008. In 2009 he lodged a claim for payment in lieu of untaken annual leave for 2006, 2007 and 2008.

The Court allowed Schulte's claim in respect of the 20 days per year he was entitled to under EU law and the five days he was entitled to under German law due to his disability. KHS appealed, pointing out that his entitlement to annual leave for 2006 was lost due to German national law, which provided that workers lost their right to holiday (or pay in lieu) at the end of a 15 month carry over period starting at the end of the year in which the holiday entitlement had arisen.

The Court made a reference to the ECJ asking whether the national rule setting down the carry-over period, which excluded entitlement to paid annual leave, was contrary to the Directive.

The ECJ held that, in this case, the national rule was compatible with the Directive as it ensured that annual leave retained its positive effect as a rest period.

Employment Tribunals have been struggling to interpret the Working Time Regulations in line with the various European case decisions that have been clarifying Employees' entitlement to holiday. We were told in May this year that the UK Government is intending to review the Working Time Regulations so that they can ensure that the Regulations comply with the various decisions that have been announced by the Courts in recent months. However, in the meantime Tribunals will be faced with some uncertainty as to whether or not to implement a 12 month carry over in line with this case or to err on the side of caution and allow a longer carry over period. Employers will need to take a view on how they proceed when faced with situations such as these. Our view is that it is likely that in the absence of further guidance Tribunals would apply a 15 month carry over period and employers should be wary therefore of limiting carry over any further.

It is important to note that this case clearly demonstrates that the entitlement to paid holiday cannot be undermined by imposing conditions that are difficult to meet. This case casts doubt on the EAT's recent decision in Fraser v St George's NHS Trust (mentioned above) where it was held that an employee absent on sick leave still had to give proper notice pursuant to Regulation 15 in order to be entitled to paid annual leave at a later date. We will therefore keep an eye on any further cases on this area of law and keep you updated as to how annual leave is accumulated during sick leave.

The Government intend to introduce "protected conversations"

In his speech at the beginning of November the Prime Minister, David Cameron, confirmed that the Government plans to introduce "protected conversations" into the workplace so that management can have frank conversations with their employees regarding performance issues without fearing that their words will be used as a basis for a constructive dismissal claim.

We understand that it is intended that these "protected conversations" will not be admissible as evidence in Employment Tribunal proceedings if an employee later brings a claim.

David Cameron's announcement is part of the Government's aim to reduce the amount of red tape employers currently encounter. Mr Cameron has said that the Government will be consulting on the introduction of "protected conversations" so that employers and employees feel able to sit down together and have a frank conversation whether as a result of an employer's or employee's request.

We have not been given any guidance yet as to what conversations will be covered by this proposal. We cannot envisage that the Government would include, for example, discriminatory conversations within this protected framework. Situations could therefore arise where part of the conversation is protected and part of it is not. As soon as further details are released, we will update you.

We reported last month that the Government has also confirmed its intention to introduce fees for lodging employment claims and to raise the qualifying period for unfair dismissal claims from one year up to two years. This latest announcement is yet more good news for employers.

The Employment team at Moore Blatch would like to wish all their clients and contacts a very happy Christmas and a prosperous New Year.

Contact Us

If you require any further advice on any of the issues contained in this update, please do not hesitate to contact us.

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