



Changes for the better?

There's been plenty afoot in the various aspects of the law on managing change.

First, some reassurance for employers about collective consultation on redundancies. In *Phillips v Xtera Communications*, the EAT considered the situation in which the number of nominated candidates for election only equals the intended number of representatives and, therefore, the employer does not organise a ballot. It ruled that there is no breach of the law - the statutory requirement for an 'election' is nevertheless satisfied. And, in *Independent Insurance v Aspinall*, the EAT looked at the remedy for an employer's breach of the collective consultation rules – the 'protective award' (of up to 13 weeks' pay per affected employee). It decided that, if the complaint is brought by an individual claimant (rather than by trade unions or elected representatives), the protective award can be made in favour of the claimant only and not of the whole class of redundant employees.

Cutting pay or other contractual benefits has been an increasingly common tactic to seek to avoid or reduce job losses. What if an employee refuses to accept change of this type and is consequently dismissed? Will the dismissal be fair? Well, we have known for many years that it can be – if there is a good business reason for the pay cut, if alternative measures to save cost have been considered and if there has been consultation with the employee to seek

agreement. In *Garside & Laycock v Booth*, the EAT has reminded us that the vital question is whether it is reasonable for the employer to dismiss, not whether it would be reasonable for the employee to accept the revised terms. So far, so good. But the EAT goes on to suggest that a dismissal could be unreasonable if the employer's own managers did not reduce their own salaries. Over to you...

And then there's TUPE. This quarter's most notable occurrence is the Supreme Court's referral of *Parkwood v Alemo Herron* to the European Court of Justice (ECJ). The question is whether employees who transfer from employment with collective bargaining on pay and contracts that incorporate its results can continue to rely on those contracts against their new employer to benefit from increases agreed through that collective bargaining after the transfer – even though their new employer does not participate in the bargaining forum. It is of particular importance in the context of employees who have moved into the private sector from the public. In one sense, the referral is a surprise. The only previous ECJ ruling is clear that the relevant EU Directive does not demand the application of post-transfer pay agreements to transferred employees. But the Supreme Court was distracted by the prospect that the Directive permitted national laws (TUPE) to adopt a 'dynamic' approach, more generous to employees. So, if you'll just wait another 12 months or so, there should be an answer for you!

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Agency workers – myths and realities

The Agency Workers' Regulations 2010 will come into force, at last, on 1st October. A lot of commentary has reduced this law to an obligation on 'employers' (you) to give agency workers equality with their own staff. That is not really correct.

It will principally be up to the 'temporary work agency' (TWA) that hires out an agency worker (AW) to apply the main provision: to accord an AW who has worked for the same hirer in fundamentally the same role for a qualifying period of 12 weeks the same basic working conditions and arrangements as *if* directly recruited by the hirer to do that type of work. AWs must have their current terms *improved* if the hirer normally offers its own employees better ones for pay, annual leave, working hours, and rest breaks. So it is the hirer's contracts and pay structures that are the point of reference. But any resultant changes will normally be through the only contract that the AW has – with the TWA concerned.

It will be up to hirers (employers) to give TWAs information on their terms and conditions. Importantly, if they fail to do so, the TWA may transfer to the hirer some or all of its financial liability for improved terms for the AW. Hirers must also notify a TWA of any changes in the job of an AW. So how does this apparatus work in more detail? Unlike the equal pay laws, the Regulations do not require the AW to identify a comparator. It is sufficient if the hirer's standard employment terms cover the type of work or job that the AW has been doing. And, other than for pay (which is related to the worth of a particular job), the absence of an employee doing comparable work for the hirer need not matter. If it is apparent that anybody employed by the hirer, regardless of capacity, enjoys better terms, the AW's terms will have to be improved to match them.

The qualifying period can be accrued by an AW through more than one TWA. It will be up to the TWA supplying the AW to the hirer when the 12 weeks is first attained to improve his or her terms. The 12 weeks need not be consecutive. Provided that the other requirements (same hirer, same job) are satisfied, a break of up to 6 weeks between 'assignments' can be bridged by the surrounding working periods. So can breaks for sickness/injury (up to 28 weeks) and holidays. And weeks of absence for pregnancy/maternity (until 26 weeks after childbirth) and paternity or adoption leave actually count towards the qualifying period. Continuity can be broken if the AW is switched to a 'substantively different role'. So it would be logical to expect clear guidance on that expression. But the guidance simply lists potential indicators of such a change: different skills and competences; extra training or

a new qualification; a different location or cost centre; a different rate of pay; different hours; a new manager, or new equipment. It then opines safely that a move from production line to packing probably would be insufficient, but one from production to administration probably would suffice. However, one rule in the Regulations that is particularly definitive here is that even a clear change in role will be deemed ineffective unless and until the TWA has notified the AW in writing about it.

Some hirers or TWAs might well seek to manipulate the rules: to save money by not applying the better terms. To prevent that, the Regulations allow an employment tribunal to treat the 12-week qualifying period as satisfied (or an earlier qualification as continuing) if the AW:

- has completed two or more assignments with a current hirer, or with a current hirer and others connected to the current hirer; or
- has been switched at least twice to new jobs during an assignment with the hirer

and the tribunal considers that this is attributable to a 'structure of assignments' intended to deprive the AW of equal treatment. The introduction of the concept of 'connected hirer' (the principal elements of the Regulations contemplate only a single hirer) means that the otherwise obvious tactic of moving an AW between different companies or entities in the same group will not guarantee the denial of rights.

This provision will make it harder for hirers and TWAs (inevitably thrown together by the Regulations' requirements for notification and transfers of information and liability) to break the letter or spirit of the law. Yes, TWAs will look to pass on the costs of 'equality' in their charges to hirers. And hirers will be loth to pick them up. But a business that needs AWs might just as well use them, accept that their identity is sometimes important (so that they cannot be readily substituted), and allow the apportionment of cost to depend on the bargaining power of the hirer and TWA.

Other obligations directly on the hirer should not be overlooked. From the first day of hire (not after 12 weeks), an AW is to be given the same access as the hirer's staff to 'collective facilities and amenities'. So, subject to any qualifying requirements applied to employees, the hirer must allow an AW to use restaurants/refectories, crèches, gyms et cetera, unless denial can be objectively justified. And the AW must be provided with the same information as employees on vacancies with the hirer.

Watch what you say

Liability for negligent misstatement has previously been confined to references, but *McKie v Swindon College* takes the law a step further. A college was held liable to a former employee for negligent misstatement when, six years after his departure, it sent a derogatory e-mail to his

new employer that caused his dismissal. The college owed Mr McKie a duty of care because the damage was foreseeable and there was a link between the e-mail and his dismissal.

Elementary, my dear Watson

In *Watson v University of Strathclyde*, the Claimant was concerned about a director, Mr Taylor, whom she considered violent and aggressive. Her concern was heightened when he was convicted of a breach of the peace.

The university's secretary, Dr West, said that the conviction was a personal matter. The Claimant went off sick and her grievance about Mr Taylor's inappropriate behaviour was dismissed. She appealed because of Dr West's involvement in dismissing her grievance, claiming that he had a conflict of interest after publicly backing Mr Taylor. An appeal panel (without Dr West) concluded that there had been no conflict of interest and then (now with Dr West) rejected

the appeal. The Claimant resigned and claimed constructive dismissal.

The EAT considered that, to be fair, a hearing must be free from actual bias and from apparent bias. It held that any reasonable employer would have had regard to the Claimant's concerns and held the appeal without Dr West.

Neither the subject of a grievance nor anyone closely associated with that person should be involved in the investigation or hearing of that grievance.

Third-party harassment

In *Conteh v Parking Partners*, a black car park attendant claimed that customers had racially abused her. Faced with the customers' denials and inconclusive CCTV footage, the employer took no action. Ms Conteh complained that it had not done enough to prevent the harassment and claimed discrimination and harassment on grounds of her race.

The EAT said that the employer's inaction had not been on the grounds of race. It would have reacted in the same way to a complaint by any employee.

Of course, the Equality Act now provides that an employer is liable if, in the course of employment, an employee is harassed by a third party and the employer knows that the employee has been subjected to such harassment at least twice before.

While the Government will consult on removing this law (as 'unworkable'), it is important that your equal opportunities policy clearly cover contractors and others who might come into contact with your staff.

Faith in retirement

Remember the good old fair retirement procedure? The one that allowed you to dismiss those aged 65 or over without fear of sanction? You can't issue notices to start it anymore. But, you might still receive, from employees who received such notices between February and 5th April, requests to continue working. So, the decision in *Ayodele v Compass* might be worth noting. The EAT said that the requirement for employers to 'consider' such requests (generally, through a meeting) involved acting in good faith. Thus, an employer who admitted to having an inflexible rule about retirement at 65 and, therefore, to treating meetings with the employee as pure formalities could not rely on use of the procedure to justify the resultant dismissal. However, the EAT did observe that

compliance with the rules was not onerous and that it would normally be very difficult for a claimant to show bad faith – in particular, it could not be inferred from the existence of a general policy (as opposed to an inflexible rule) on retiring at 65 or from the simple fact of an employee's request having been refused. The EAT did not specify a need to give reasons for refusal, but one of the easiest ways of hopping over the low hurdle presented by this ruling is to have a couple available. That shouldn't be difficult – reasons may be specific to a department or function or may be broader-based (if you have a policy to retire, the very fact you do would suggest it exists for a reason).

PILONs can pile on the agony

Pay in lieu of notice ('PILON') clauses are common. Their purpose is to permit immediate termination by the employer without a breach of contract. In *Société Générale v Geys*, the clause was fairly typical, allowing the employer to terminate 'with immediate effect by making a payment in lieu of notice'. Having told Mr Geys that he was dismissed immediately and issued written confirmation, the employer did not credit his bank account with the notice payment for some three weeks. The Court of Appeal said that, given the wording of the PILON clause, the contract did not

terminate until the payment occurred. So, look at the wording of any PILON clause that you use. Does its effect depend rigidly on the employee's actual receipt of the PILON? If so, look to amend it to allow the PILON to be made within a stated period following termination. Or make sure that 'the system' accommodates making the PILON on the date when the employee is told of instant dismissal.

Just how much adjustment is reasonable?

Mr Mylott, who had a history of drug use and mental health problems, was dismissed by Tameside Hospital NHS Trust because of his poor attendance. Part of his claim of disability discrimination was that the Trust had failed to make a reasonable adjustment in not considering the possibility of ill-health early retirement.

The EAT held that the duty to make reasonable adjustments involved steps to enable the disabled employee to remain in employment, not steps to allow a disabled employee to leave on favourable terms, such as those for ill-health retirement.

Capability dismissals

In *D B Schenker Rail v Doolan*, a case about dismissal after a period of stress-related absence, the EAT decided that the standard of enquiry required of an employer in a capability dismissal was the same as the *Burchell* test for conduct dismissals – reasonable grounds for belief. While the employer must ascertain the true medical position, from

there the decision to dismiss is managerial, not medical. The employer is entitled to make its own, reasonable assessment of the risk of the employee's health deteriorating on return to work.

You've been warned

Employees are often dismissed because they have already been through the warning stages of a disciplinary procedure. The conventional wisdom has been that earlier 'live' warnings contributing to a decision that 'enough is enough' are a matter of record and not for re-examination. But, in *Davies v Sandwell Council*, the EAT said that, whether or not the employee had appealed against the

warning (in *Davies*, he had not), a tribunal was entitled to look behind a final warning to ensure there had been prima facie grounds for it. That doesn't mean employers contemplating dismissal have to go back in time, embarking on some great paper chase. Rather, it means that there is a premium on getting the warning right in the first place.

Cost can justify discrimination

Claims of indirect discrimination require tribunals to decide whether an employer's provision, criterion or practice can be justified as a 'proportionate means of achieving a legitimate aim'. A good example is *Cherfi v G4S Security Services*. Mr Cherfi, a Muslim, was told that he could no longer leave site on Fridays to attend a Mosque because G4S was contractually obliged to ensure that the specified

number of security guards were present throughout operating hours.

The EAT found that, although Mr Cherfi was placed at a disadvantage, G4S risked losing the contract if it failed to comply with its terms. So, its policy was reasonable and proportionate.

Implied terms

Garratt v Mirror Group Newspapers is an example of a contractual term being implied through custom and practice. The Court of Appeal decided that a term requiring Mr Garratt to sign a compromise agreement before receiving an enhanced redundancy payment could be implied because, amongst other things, no employee had

been paid an enhanced redundancy payment without signing a compromise agreement since 1993 and no other employee had insisted on an enhanced redundancy payment without signing a compromise agreement.

Although care has been taken in the preparation of this Newsletter, Collinson Grant cannot accept responsibility for errors, omissions or advice given. Readers should note that only Acts of Parliament and Statutory Instruments have the force of law and only the courts can authoritatively interpret the law.



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