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In the news

Nick Hobden's notes from the Employment Law Update Seminar, 22 March 2012

Nick Hobden updated 52 Hr professionals and business leaders on redundancy, TUPE service provision changes, the government's proposals on executive pay, unfair dismissal and confidential information.

Topic One: Redundancy

I am going to update you on three current issues relating to redundancy:

1. The recent case law on pooling;
2. Selecting employees at risk of redundancy for alternative roles; and
3. The government's proposals to reduce the collective consultation period where 100 or more redundancies are proposed from 90 to 30 days.

1. The Recent case law on pooling:

Selecting the correct pools in redundancy situations is a task many employers struggle with. I am going to look at two recent cases which have shed further light on this area.

It is worth remembering at this point that a redundancy dismissal will only be fair where:

1. there is a genuine redundancy situation;
2. a fair procedure is followed; and
3. the dismissal was within the range of reasonable responses open to a reasonable employer.

Identifying the pool of employees at risk of redundancy will not only come under whether a fair procedure is followed, but it is also a substantive issue about whether someone or others should have been included in the pool, let alone included and selected for redundancy.

Halpin v Sandpiper Books Ltd UKEAT/0171/11/LA February 2012:

The EAT considered the following point in Halpin v Sandpiper Books Ltd:

Question: Is it reasonable for an employer to have a pool containing just one employee?

The Facts: Sandpiper Books, a book distributor wanted to expand its market into China and so they sent one of their employees, a Mr Halpin, out to China. When in the UK, he did administrative and analysis work, a role that he did little of once in China. Eventually, Sandpiper outsourced the work in China to a local book agent, resulting in Mr Halpin's position being put at

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risk of redundancy. Given that Mr Halpin was the only employee in China, he was the only employee in the pool.

After extensive consultation and the offer of alternative part-time admin work in the UK, which Mr Halpin rejected, he was made redundant and subsequently claimed for Unfair Dismissal.

The Tribunal found that there had been meaningful consultation and that a fair procedure had been followed. The claim was dismissed and Mr Halpin appealed against the decision.

The Issues: Mr Halpin argued that no reasonable employer would have limited the pool to those workers whose work had diminished and that other workers with interchangeable skills should have been included in the pool.

How EAT dealt with it? the appeal was dismissed. The decision as to the size of the pool is one for employer to make, and Sandpiper Books had made a logical decision given Mr Halpin was the only employee in China and it was his work there that was ceasing. It would be difficult for a Tribunal to overturn that decision.

The Halpin case also raises the question of 'bumping' – i.e. whether or not Sandpiper Books could have 'bumped' out an employee whose work was not diminishing out of their job in favour of Mr Halpin. Employers are not under an obligation to consider bumping, but in some cases it could be unreasonable not to do so. I'll return to that point in a few minutes.

<u>Capita Hartshead Ltd v Byard UKEAT/0445/11 February 2012:</u>

Capita is another recent case which, like Halpin, considered the question of the size of a pool of employees for redundancy

The Question: Can a pool the same size as the number of proposed redundancies be reasonable, or is the consultation inevitably of no real value?

The Facts: Ms Byard was one of four actuaries managing pension funds employed by Capita Hartshead. Unfortunately Capita lost a number of Ms Byard's clients and so she was put at risk of redundancy in a pool of just one. Capita considered that the decision to limit the pool to Ms Byard and not the other three actuaries was 'feasible and responsible' in the circumstances. After an individual consultation, Ms Byard was made redundant and claimed unfair dismissal.

The Issue: Capita argued their choice of pool was reasonable because Byard's workload had reduced, team morale would be affected if the other actuaries were told they were at risk and that there was a risk of losing clients if they were transferred between actuaries. The Tribunal recognised, as in the Halpin case, that defining the pool is a matter for the employer, not the Tribunal. However, when the pool is the same size as the number of redundancies, this was less reasonable because the Tribunal cannot review the selection process.

The Tribunal upheld Ms Byard's claim for UD. The other actuaries should have been included and there was no evidence to suggest that Ms Byard would have been selected because the quality of her work had been praised. Capita appealed on the basis that the Tribunal substituted its own view of the appropriate pool.

How the EAT dealt with it? The EAT when considering Capita's appeal set out the correct approach when deciding if the pool was correct:

- It is not for the Tribunal to decide if it would have been fairer to act in another way – is question of whether decision was in range of reasonable responses;
- Choice of pool is also subject to reasonable response test;
- No need for pool to be limited to employees doing same or similar work. Defining the pool is a matter for employer to decide, and difficult for employee to challenge as long as the employer has genuinely applied its mind to the problem; and
- Tribunal have to consider if employer genuinely applied its mind to considering who should be in the pool.

The EAT dismissed Capita's appeal and upheld the Tribunal's decision that Capita had not genuinely applied its mind to the issue of who should be in the pool. Capita were caught out by overstating the commercial risks involved in limiting the pool to just one employee. The Tribunal found that the risk of Capita losing clients if they were transferred between actuaries was only 'slight' and that Capita had successfully transferred clients in the past. Furthermore, the other actuaries did similar work and Ms Byard's work had been praised. So we can see then, that the issue of 'bumping' has cropped up again in this case. Although the other 3 actuaries' work had not diminished, Capita should have considered bumping Ms Byard into one of the other actuaries' position.

Practical Implications: as employers, you must exercise caution when selecting a pool with the same number of proposed redundancies (usually one) – genuinely applying your mind to the task makes it harder for the dismissal to be deemed unfair, but not impossible. The Halpin case shows that it is certainly possible, but there must be strong reasons behind the decision to have a pool the same size as the proposed number of redundancies because Tribunals are more likely to look carefully at the reasonableness of the pool on the basis that subsequent consultation is realistically of little value.

Be prepared to not only consider pooling those with similar skills but also bumping even if one part of the business with say one employee appears to be affected by a reduction in demand/activity.

2. Selecting Employees at risk for suitable alternative role

When having to make redundancies, many employers will attempt to find an alternative position within the company for the employees at risk. The case of Samsung Electronics (UK) Ltd v Monte D'Cruz [2012] UKEAT 0039/11 March 2012 considered:

The Question: Can subjective criteria be used when considering the suitability of an at risk employee for an alternative position?

The Facts: Mr Monte D'Cruz was employed by Samsung and was one of four senior managers reporting to the Head of Print. The four roles were to be merged into one role and Mr Monte D'Cruz was told his position was at risk, but he was invited to apply for the new role as well as others that would be created. He unsuccessfully applied for the Head of Department role, and so applied for another position, Business Region Team Leader, that he felt he was well suited to. Although he was considered for it, he was not offered the position and it was eventually offered to an external candidate.

The Issue: Monte D'Cruz brought a claim for UD on the basis that the failure to appoint him was engineered to allow management to bring in an external candidate. The Tribunal found the dismissal to be unfair, partly because Samsung's approach to considering the alternative employment was flawed – concerns were raised about the objectivity of the criteria used. Samsung appealed to the EAT.

How the EAT dealt with it? The EAT overturned the Tribunal's decision and held that an employer is entitled to use its own judgment when decided when deciding which candidate will perform best in a new role. It is a very different process from selecting an employee for redundancy and subjective criteria can be used.

Practical Implications: This case demonstrates that employers do not need to be wholly objective when considering an at risk employee for an alternative role. Employers are free to decide who is and who is not right for a particular position. Recruitment methods will rely on a degree of subjectivity and interview procedures should not be overly scrutinised by the Tribunal.

3. Government's Proposals to reduce the collective redundancy consultation period

Worth mentioning briefly, is the government's proposal to reduce the collective redundancy consultation period where 100 or more redundancies are proposed from 90 to 30 days. The proposal is one of many put forward by the government to reform employment relations, some of which James will touch on this morning.

Under the current law employers are under a duty to consult with affected employees and their trade union or elected representatives. The consultation period must begin no less than 90 days before the date of the first dismissal. There is no requirement for you to consult with representatives for the full 90 days but there is a moratorium on dismissals until the 90 day

period has elapsed. The result is that consultation can be concluded within, say, 60 days, but then you, as the employer, have to wait another month before the first dismissal can take place.

The obvious benefit then, of reducing the consultation period is of course that it would speed up the consultation process and would remove that delay between the conclusion of the consultation and the lapse of the consultation period. This should reduce costs and will allow you greater flexibility when making these difficult decisions.

The government are holding a public consultation on the issue later this year

Topic Two: TUPE Service Provision Changes

There is some new case law on everyone's favourite subject, TUPE Service Provision Changes. I'm going to talk you through four recent cases.

Just to remind you about this tricky area of law:

In addition to the traditional operation of TUPE where an economic entity which is capable of transfer retains its identity after transfer, TUPE applies in contracting activities. Service provision changes are defined in Reg 3(1)(b) of TUPE 2006 and apply in three different service provision change situations:

(i) **Outsourcing:** activities cease to be carried out by the client on his own behalf and are instead carried out by a contractor;

(ii) **Change from one contractor to another:** activities are ceased to be carried out for a client by contractor A, and are subsequently carried out by contractor B; and

(iii) **Insourcing:** activities are ceased to be carried out by a contractor or subsequent contractor and are instead carried by the client on his own behalf.

1. Enterprise Management Services Ltd v Connect Up Ltd UKEAT/0462/10 December 2011

The Question: Will there be a transfer under TUPE where the activities carried out by an incoming contractor differ to those of the outgoing contractor?

The Facts: This case concerned the provision of IT services to Leeds City Council by Enterprise. Enterprise initially provided IT services to all of the LCC schools, under the terms of a framework agreement. Enterprise decided not to tender again when the framework agreement came to an end because the service requirements had changed. The services were subsequently taken over by Connect Up.

The Issue: Enterprise dismissed employees who had been working under the framework agreement in the belief that they should have been transferred to Connect Up because there had been a transfer under TUPE. The Tribunal found that there was no TUPE transfer because

there were significant differences between the activities carried out by Connect and Enterprise. Enterprise appealed.

How the EAT dealt with it? The EAT dismissed the appeal. The EAT gave guidance that when considering if a transfer under TUPE has taken place, the Tribunal will

1. Identify the activities carried out by the original contractor; and

2. Then determine whether the incoming contractor is carrying out essentially the same activities. This will be a matter of fact and a question of degree for the Tribunal.

In the Enterprise case, 15% of the work carried out by the Enterprise employees was omitted from Connect Up's activities and this was deemed to be significantly different.

Further, Connect Up had lost approximately 40% of the schools to five other service providers – a process referred to as fragmentation – which meant that the case fell outside of TUPE.

Practical Implications: The Enterprise case demonstrates that changes in activities carried out by service providers need not be that substantial to fall outside the scope of TUPE. But they can be materially different, e.g. 15% different, 85% the same. This potentially makes it easier to avoid TUPE applying when poor performing service contractors lose their contracts.

2. Hunter v McCarrick UKEAT/0617/11 December 2011

The Question: For the purposes of second-generation outsourcing, can there be a service provision change where there is not only a change of contractor, but also a change of client?

The Facts: Mr Hunter employed Mr McCarrick to manage a property portfolio, from August 2009 until March 2010. He was dismissed and brought an unfair dismissal claim on the basis that he had the necessary 1 years' continuous employment (dating from October 2005) as a result of two TUPE transfers in February and August 2009.

1. Under the first transaction in Feb 09, Waterbridge Group Ltd ceased to carry out property management services in relation to its property portfolio and these were carried out instead by WCP Management Ltd on Waterbridge's behalf.

2. Under the second transaction in August, the lending institution of the property portfolio (Aviva) appointed receivers to control the properties, and King Sturge to manage the properties. The effect being that property management services were no longer carried out on WG's behalf, but on the behalf of Aviva/the receivers' behalf.

The Tribunal held that both transactions were service provision changes under Reg 3(1)(b)(i) and (ii) of TUPE 2006. They found that an SPC could occur where there was a change of client on whose behalf the services are carried out. Perhaps unsurprisingly, Mr Hunter appealed against the decision.

The Issue: Mr Hunter's main argument was that TUPE requires activities carried out by different contractors before and after the transfer to be for the same client. A change of client when services were outsourced meant the SPC test was not met and TUPE did not apply to preserve continuity of employment.

How the EAT dealt with it? The EAT agreed with Mr Hunter – the SPC test will only be met if the activities carried out by different contractors before and after a change in service provision are on behalf of the same client.

3. Abellio London Ltd v Musse and others UKEAT/0283/11 January 2012

The Question: Did a change of location resulting from a TUPE transfer amount to a substantial and detrimental change to allow employees to resign and claim they had been constructively dismissed?

The Facts: The employees were bus drivers for CentreWest and all drove the same bus route. All operated from a depot in Westbourne Park, which 'suited their particular family circumstances and where they lived'. They were informed that the contract with TFL to run their bus route was to be transferred to Abellio London Ltd, and that their bus route would now commence from Abellio's depot, six miles away in Battersea. It was accepted that this was an SPC under TUPE. The employees had concerns about the change of location because it would extend the time taken for them to travel to their starting place of work by up to an hour each way, so they resigned.

Mr Musse resigned prior to the transfer, and the other four employees resigned on the day of the transfer. The Claimants brought various claims, including automatic unfair dismissal for TUPE related reason

The Tribunal found that they were constructively dismissed. The change of location was not permitted by the Claimants' employment contract, there was no proper mobility clause, and there was a substantial change to the Claimants' working conditions to their material detriment. CentreWest was liable for Mr Musse's claims because he resigned before the transfer, possibly because of an anticipated materially detrimental change to his T&Cs. Abellio was liable for the other four employees' claims as new employer bringing in the change from TUPE day.

The Issue: Abellio and CentreWest appealed the decision. CentreWest argued it was entitled to require any employee to work at any current depot. Employment remains seamless under TUPE, therefore the new Abellio depot was deemed to be CentreWest's. Abellio argued that because the Claimants resigned on the day of the transfer, they had virtually no time to vary the contract and so the Tribunal should have applied a doctrine of substantial equivalence because it was impossible for them, as a matter of practicality, to transfer the exact terms of employment.

Both argued that in terms of the meaning of 'material detriment', the Tribunal failed to recognise the consideration that TUPE gives to the employer's interests.

In terms of Abellio, each of the Claimants regarded the change in location as detrimental because they had raised grievances or concerns with their managers. The detriment was 'material' because the Claimants' working days would be extended by between one and two hours.

How the EAT dealt with it? The EAT dismissed the appeals by Abellio, but allowed CentreWest's appeal in relation to Mr Musse, because the Tribunal had failed to take into account whether Mr Musse had objected to the transfer. This point was transferred back to the Tribunal for determination and is awaiting decision.

Practical Implications: This case follows Tapere v South London and Maudsley NHS Trust [2009] IRLR 972 and further demonstrates that the meaning of 'material detriment' should be considered from the employee's perspective, the implication being that it is easy for employees to satisfy this aspect of their claim. It is sensible therefore, for transferees to seek indemnity protection against the risk of automatic unfair dismissal claims (re a change of location) when negotiating contractual arrangements with the transferor.

Abellio's actions also beg the question, why did they not argue there was an ETO reason for the dismissals? There is nothing in the judgment pointing to this, but Abellio's counsel did make the point that a change of contractor would almost inevitably involve a change of the depot where the buses are parked up.

Generally speaking, business should consider the employment law aspects of a transfer from the outset before committing to a particular course of action and consult before the transfer on ETO grounds.

4. Eddie Stobart Ltd v Moreman and Others UKEAT 0223/11 February 2012

The Question: Can employees who spend the majority of their time working on a contract for a particular client on a service provision change under Reg 3(1)(b) constitute an 'organised grouping' under Reg 3(3)(a)(i) of TUPE?

The Facts: There were 35 employees in this case, employed by Eddie Stobart at a depot near Nottingham. The depot closed in 2009 and ES considered that employees who had spent at least 50% of their time working on a contract for Vion had been transferred to FJG Logistics Ltd, who was taking over the Vion contract. FJG did not accept that TUPE applied to the outsourcing of the contract and so the employees were dismissed by ES.

The Claimants brought claims against ES and/or FJG. FJG sought to have the claims struck out because the Claimants had not shown they were assigned to any particular client, and so could not rely on TUPE. The Tribunal struck out the claim against FJG – the Claimants were not an 'organised group of employees' because it was only as a result of the way their shifts worked out that they did the majority of their work on the Vion contract – not because it was their team's principal purpose to carry out the work for Vion.

The Issue: ES appealed against the decision. It argued that the Claimants did not have to show that they were organised as members of a 'Vion team'. It was sufficient that they worked mostly on the Vion contract.

How the EAT dealt with it? In terms of the 'organised grouping' test under TUPE, the principal purpose of a group should be the carrying out of activities for a particular client. It is not enough that they just happen to carry out the activities as part of their day-to-day work. They were not a dedicated Vion team. The EAT dismissed the appeal.

Practical implications: This case is confirmation that a group of employees who work mostly for a particular client will not be sufficient to satisfy the 'organised grouping' test. Employees must be deliberately organised into an identifiable client grouping to be wholly or mainly assigned.

Topic Three: Government proposals on Executive Pay

Barely a week goes by, without a story in the press about executive pay. In an attempt to improve the connection between executive pay and company performance, the government has put forward a number of proposals to overhaul the executive pay system.

Some of the proposals include:

- Listed companies providing more information on how pay is set. Remuneration reports will be divided into two sections to cover both the current and future pay policies used to set pay;
- Shareholders will have binding, rather than advisory votes on pay policies. This will be subject to further consultation on how to deal with conflicts between the new voting requirements and existing contractual obligations;
- Provisions to reduce, withhold or in exceptional cases claw back executive pay for when a company performs poorly;
- Encouraging the appointment of directors from more diverse backgrounds including individuals who have not previously been directors; and
- Greater employee consultation in setting directors' pay.

It might be useful for us to consider how executive pay is put together before and after the proposals.

<u>How is Executive Pay currently controlled?</u>

Despite what much of the general public thinks, executive pay is already governed by statutory provisions in the Companies Act 2006, Regulations under the Corporate Governance Code and a number of contractual rules.

The Companies Act 2006:

Details of executive remuneration must be disclosed by way of a remuneration report. Details on a number of areas are required, for example, how the board formulates remuneration, company policy on executive pay etc. Shareholders currently have an advisory vote on the company's remuneration report.

Corporate Governance Code:

The Code intends to ensure that shareholders can engage in the process of determining remuneration.

Topic Four: Unfair Dismissal

Although we are not focussing wholly on unfair dismissal claims today, I have identified two cases worth briefly touching on:

1. Pennell v Tardis Environmental UK
2. Airbus UK Limited v Webb

1. Pennell v Tardis Environmental UK March 2012

This case demonstrates the importance of approaching gross misconduct investigations with an open mind, as demonstrated by a Birmingham Employment Tribunal decision reported in recently in the legal press.

The Facts: Mr Pennell was a lorry driver for Tardis Environmental UK. He was dismissed for allegedly losing his way on the way to deliver mobile toilets to the V Festival at Chelmsford last year. Mr Pennell failed to follow a red route to the festival site, resulting in him causing £2,500 worth of damage to the firm's lorry trailer when he drove over an aluminium sheet covering a hole on a bridge, which the lorry sunk into.

Mr Pennell had a previous unblemished record, but he was suspended and eventually dismissed for gross misconduct due to negligence.

The Issue: Mr Pennell brought a claim for unfair dismissal and claimed he had been given wrong directions near the festival site. Mr Pennell wanted to be reinstated, rather than receive compensation, because he had been unable to find alternative employment due to the firm's failure to provide him with a reference.

How the Tribunal dealt with it: The Employment Judge was of the opinion that the firm had failed to follow the correct dismissal procedure and that 'the management did not approach the matter with an open mind'. The Judge gave Tardis a short amount of time to consider re-instating Mr

Pennell, but it was eventually decided that Mr Pennell should be compensated, and he was duly awarded £28,000 by the Tribunal.

Practical Points to take from this case: This decision shows the importance of following correct dismissal procedures, and not jumping to conclusions when dealing with instances of gross misconduct. The award of £28,000 is quite substantial in comparison to the £2,500 worth of damage caused to the lorry in the accident.

2. Airbus UK Limited v Webb [2008] EWCA Civ 49 February 2008

The Question: can an employer take into account an expired warning in its decision to dismiss?

The Facts: Mr Webb was employed as an aircraft fitter by Airbus Limited. Mr Webb was summarily dismissed for gross misconduct – he misused company time and equipment by washing his car during work hours. He appealed the decision, and was offered a final written warning to remain on his personnel file for 12 months, which he duly accepted. When he was re-instated he was told that any further misconduct would likely lead to his dismissal.

Three weeks after the expiry of his final written warning, Mr Webb was caught watching television with four colleagues during working hours. Mr Webb was summarily dismissed, while the others were given final warnings. Mr Webb's dismissal letter made no mention of the expired final written warning. He subsequently brought a claim for UD arguing that Airbus acted unfairly by taking into account the expired final written warning when deciding the penalty for the later misconduct. The Tribunal relied on the previous case of Diosynth Ltd v Thomson [2006] IRLR 284 and found the dismissal to be unfair, interpreting *Diosynth* to mean that previous spent warnings should be ignored by employers and Tribunals for all purposes.

The Issue: Airbus appealed this decision on the basis that *Diosynth* was distinguishable and/or *Diosynth* was wrong. The EAT rejected the appeal on the basis that it was inappropriate to depart from previous EAT decisions. Airbus appealed against the EAT's decision.

How the Court of Appeal dealt with it? The Court found that the expired warning was not the principal reason for Webb's dismissal, and the misconduct (rather than the warning itself) in respect of which the warning was given was not time-limited. Therefore the misconduct could still be of relevance to the reasonableness of Airbus' response to the later misconduct. *Diosynth* was distinguished and the Court noted that it was not authority for employers and Tribunals to ignore expired warnings for **all** purposes. The CoA upheld Airbus' appeal and dismissed Mr Webb's claim.

Practical Implications: this case is important for employers because it states that employers can take into account a previous expired warning and the underlying misconduct as long as these are not the principal reasons for the dismissal.

Employment Law Update Seminar 22 March 2012: Nick Hobden's notes

Continued

Topic Five: Confidential Information

Caterpillar Logistics Services (UK) Ltd v Huesca de Crean [2012] EWCA civ 156 December 2011:

The Question: not so much a question but a consideration of dealing with confidentiality agreements and confidential information post-termination as a means of restraining someone's activities.

The Facts: Ms De Crean was employed by Caterpillar to manage their logistics centre. There were no restrictive covenants in her contract, but she did sign a confidentiality agreement. It applied to both during and after her employment.

Ms De Crean resigned to join one of Caterpillar's customers; Quinton Hazell Automotive Ltd. Caterpillar argued that Ms De Crean would inevitably have to disclose confidential information in the course of her employment with Quinton, because she was putting herself on the opposite side of many of the issues she had dealt with at Caterpillar. Ms De Crean undertook not to breach the confidentiality agreement and to refrain from certain activities in her new role.

Caterpillar made an interim application for an (amongst other things) injunction:

- preventing Ms De Crean from using or disclosing confidential information, which was defined in generic terms; and

- a 'barring order' preventing Ms De Crean from being involved in the commercial relationship between Caterpillar and Quinton.

The High Court refused all the interim relief sought. No barring order would be granted as it would have disproportionate to do so. Ms De Crean had been a loyal employee and had already offered to fulfil a number of undertakings.

The Court also declined to grant a confidentiality injunction because the order sought by Caterpillar was not sufficiently specified in terms of the information it was seeking to keep confidential. The claim was struck out in any event (no reasonable grounds for bringing it).

The Issue: Caterpillar appealed.

How the CoA dealt with it: The CoA dismissed the appeal.

1. The Barring Order – such relief should not be extended to the ordinary relationship of employer and employee. The proper course of action for Caterpillar would have been to require Ms De Crean to enter into a restrictive covenant.

2. The Confidentiality Injunction should not have been granted for the simple reason that Caterpillar failed to show that Ms De Crean had broken, or intended to break, the terms

of the agreement. She had also offered an undertaking. Caterpillar's injunction application was also far too vague, because it did not specify the information they were seeking to protect.

Practical Implications:

1. Employers should consider making careful use of restrictive covenants in the employment contract if you wish to obtain protection for confidential information post-termination,

2. Precision is key when applying for a confidentiality injunction: the employer must define what amounts to confidential information

3. Avoid being too aggressive: Caterpillar took an aggressive stance against Ms De Crean right from the start of the litigation process. There was no suggestion that Ms De Crean was going to divulge confidential information and Caterpillar made no attempt to reach an amicable solution.

If you require further information please contact Nick Hobden, Partner in Employment.

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