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Employment Newsletter

Introduction

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- Do employees have an inalienable right to take annual leave?

TUPE transfers and continuing obligations under collective agreements

It is well known that where there is a transfer of a business or an undertaking (or part of a business or undertaking) the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE") provides that the employment contracts of the transferring employees transfer to the new employer. The employment contracts are treated as if they were originally made between the employees and the new employer, who takes over all the obligations, duties and so on imposed under the contracts. This has included terms incorporated by reference to collective agreements. What has surprised many employers is that if the contracts included a term that allowed for the renegotiation of their terms by reference to collective agreements made by third parties, that term, along with the rest, transferred to the new employer who was bound by any subsequently negotiated terms. This has taken effect notwithstanding the transferee employer may not have had any involvement in the negotiation of the new terms and the employees no longer have any connection with the parties to the collective agreement.

However, a decision of the European Court of Justice ("ECJ"), *Werhof v Freeway Traffic Systems GmbH & Co KG*, C-499/04 [2006] IRLR 400 ECJ, has clarified that the Acquired Rights Directive does not require this protection. *Werhof* was applied in *Parkwood Leisure Ltd v Alemo-Herron* [2010] IRLR 298. The claimants were formerly local government employees who had worked for the London Borough of Lewisham. They were first transferred in 2002 to a private sector company, CCL Ltd and in 2004 there was a second transfer to

Parkwood Leisure Ltd, another private company. Both events were TUPE transfers and so their employment contracts were transferred. The contracts contained a term which provided that their terms and conditions would be "...in accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government Services...". At the time of the first transfer, terms relating to pay had been collectively agreed up to 2004 and CCL complied with these terms. The employees were then transferred to Parkwood who also complied with the terms relating to pay increases in accordance with the collective agreement. However, Parkwood did not accept that there was any requirement that it must implement any new terms from collective agreements entered into after the date of the transfer. It argued that it was only bound by the terms of the collective agreement in place at the time of the transfer. Therefore, when there were new negotiations involving the National Joint Council for Local Government Services ("NJC"), the terms agreed were not recognised by Parkwood as applying to its transferred employees. The council, which had previously been the employees' employer, were involved in the negotiations, as was Unison, the union to which the employees belonged. However, Parkwood could not belong to the NJC, nor could it be represented at the meetings since it was a private company. Also, Parkwood did not recognise Unison. Parkwood did not increase pay in accordance with the collective agreement and so the employees brought a claim against Parkwood for unauthorised deductions from wages.

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The case went to the C.A. where Lord Justice Rimer explained that, if it were not for the recent ECJ decision in *Werhof v Freeway Traffic Systems GmbH & Co KG*, the claimants would have succeeded in their claim. Applying the ECJ's reasoning to the *Parkwood* case, the C.A. dismissed the employees' claims and stated that the previous U.K. cases on this point, going back to *Whent v T Cartledge Ltd* [1997] IRLR 153 EAT, were wrong and should not be followed.

This will be welcome news for transferee employers who will no longer inherit a pay bargaining structure that they cannot influence but unwelcome news for the transferred employees.

How to deal with disciplinary hearings where the employee is absent

It is not uncommon for employees, who are the subject of disciplinary proceedings, to fail to attend a disciplinary hearing. This could be due to any number of reasons, such as sickness, a desire to avoid the issue or in some cases, simply trying to make life as difficult as possible for the employer. Natural justice requires that the employee has a fair hearing. This means giving the employee the opportunity of attending a meeting, hearing the allegations made against them and the supporting evidence and allowing the employee to respond to the allegations and to state his or her case. At the meeting, the employee may be able to provide an explanation and/or mitigation. However, how can the employer ensure there is a fair hearing if the employee persistently fails to attend?

In some cases, it will be necessary for a disciplinary hearing to go ahead without the employee attending. The Employment Tribunals and ACAS recognise this. Paragraph 24 of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2009) states: *"Where an employee is persistently unable or unwilling to attend the disciplinary meeting without good cause, the employer should make a decision on the evidence available."*

There is supplemental ACAS Guidance which provides: *"What if an employee repeatedly fails to attend a meeting?"*

There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issues. Employers will need to consider all the facts and come to a reasonable decision on how to proceed.

Considerations may include:

- any rules the organisation has for dealing with failing to attend disciplinary meetings;

- the seriousness of the disciplinary issue under consideration;
- the employees disciplinary record (including current warnings), general work record, work experience, position and length of service;
- medical opinion on whether the employee is fit to attend the meeting;
- how similar cases in the past have been dealt with.

Where an employee continues to be unavailable to attend a meeting, the employer may conclude that a decision will be made on the evidence available. The employee should also be informed whether this is to be the case..."

However, before proceeding without the employee, he or she should be given the opportunity to attend. In most cases the employee should be allowed at least two opportunities to attend a disciplinary hearing. If the case goes to an employment tribunal, it will be important for the employer's case that they can show that the employee was given ample opportunity to attend a hearing. An employment tribunal is unlikely to be satisfied that an employer has acted reasonably if the employee has not been allowed at least two opportunities to attend a meeting. On the other hand, an employment tribunal is likely to be sympathetic to an employer who has attempted to set up hearings on a number of occasions and the employee has failed to attend any of them, especially where the employee has given no adequate explanation for the failure to attend. If the employee does not attend the hearings, the reasons given for the failure (or conversely, any failure to give an explanation) should be taken into account by the employer when deciding the next step.

In cases where the employee fails to turn up because he or she claims to be sick, it will be necessary to check the validity of this. The employee should be referred to occupational health. An employee may have gone on sick leave and may be unable to carry out his or her job, but may be well enough to attend the disciplinary hearing. It will be necessary to ascertain whether the employee would be able physically to attend the hearing, understand the proceedings and give instructions to his or her representative. If this is possible, the hearing should go ahead. If not, it may be reasonable to postpone the hearing until the employee is well enough to participate, although the hearing cannot be postponed indefinitely. If the opinion from occupational health is that the employee is well enough to attend, this should be pointed out to the employee in the letter inviting them to attend.

It should be made clear to the employee that, if necessary, the employer may consider going ahead

with the hearing in the employee's absence. Depending on the circumstances of the case, this may be explained in the first letter inviting the employee to the hearing, or could be left until later invitations.

If the employer decides that there is no alternative but to proceed without the employee, the employer must act reasonably in order to comply with natural justice and the statutory requirements of fairness as required by the Employment Rights Act. Prior to any disciplinary hearing, an investigation should have been carried out. As part of this investigation, the employee should have been interviewed and any evidence arising from this should be given to the panel. The disciplinary panel should be given any statement made by the employee. So far as possible during the hearing, the panel should challenge the individuals presenting the management case and witnesses, with those issues which the panel believes the employee would have argued had they been present. The question which the employer should keep in mind at all times during this process is: "if I were in the position of this employee, would I believe I have been treated fairly or not?".

■ ■ ■ ■ ■ ■ ■ ■ Unlawful discrimination and stigma damages

The Court of Appeal has recently handed down an interesting judgment which deals with the award of damages for the stigma an employee may face having brought legal proceedings against his former employer.

In some cases, if it becomes known in a particular sector of the job market that a person has brought legal proceedings against his or her former employer, potential future employers may be unwilling to employ that person. The person may be stigmatised as being "difficult" or a "trouble maker". In *Chagger v Abbey National plc* [2010] IRLR 47, the CA has recognised this and has held that an employer who is responsible for putting an employee in this position should be liable for damages which result from such stigma.

Mr Chagger was made redundant by Abbey National in 2006. He subsequently brought claims in the employment tribunal for unfair dismissal, race discrimination and breach of contract. His claims were successful and he was awarded damages. Both parties appealed against aspects of the award and the case went to the CA.

As part of his judgment, Lord Justice Elias posed the question: "Should the dismissing employer bear what is termed "stigma loss"? Or should the employee be expected to recover that from the employers who

stigmatise him?" Counsel for Abbey National put forward a number of arguments as to why the original employer should not be liable, including policy arguments that if this were allowed in this case, an unexceptional case, then every employee who brings a discrimination claim would also be able to bring a claim for stigma damages. There would be the danger that tribunals would simply accept an employee's claim that he had suffered in the job market because of the stigma of having brought proceedings and employers would end up regularly having to indemnify employees for the loss of their careers. There would be no mechanism for bringing the victimising employers to court so the original employer would be unable to challenge the claim of victimisation. Nor would the original employer be able to obtain a contribution towards the damages from the employers who were actually guilty of the acts of victimisation. Also, it would mean the employee would not have to bring claims against employers who were guilty of victimisation, and who should therefore be held to account, since the employee will already have been compensated by the original employer.

The CA acknowledged the force of the arguments put forward on Abbey National's behalf, but nevertheless held that Abbey should be liable for the stigma loss suffered by Mr Chagger. Although the immediate cause of the loss to Mr Chagger in these circumstances was the unlawful acts of victimisation carried out by other employers, this did not break the chain of causation that led back to Abbey National's unlawful discrimination. The CA did not believe that holding original employers liable for stigma damages would lead to "unrealistically" high awards by tribunals. The court believed that it was not the "common experience" that employees who took proceedings against their former employers would then become almost unemployable because of the stigma that would attach to them. Also limiting the potential number of claims would be the law on victimisation which protects employees in circumstances such as these.

Elias LJ recognised the difficulties faced by an employee trying to prove unlawful victimisation and the reluctance to pursue such a claim, but also clearly stated that it would be wrong for a tribunal simply to accept an employee's assertion that he has suffered stigma or that he has suspicions that this is the case. If the employee is reluctant to bring victimisation proceedings, he should not expect the tribunal to "put much weight on what is little more than conjecture." This is especially so given the consequences for the original employer.

In this case, it was held that there was sufficient evidence of the stigma loss suffered by Mr Chagger. He

had tried to mitigate his loss and had applied for 111 roles and had been considered for more. He had applied for jobs at a lower rank than that which he had had at Abbey National and had even offered to work on a voluntary basis. He had used about 26 recruitment agencies but everything had failed to secure him a job in the finance industry.



Do employees have an inalienable right to take annual leave?

The EAT in *Lyons v Mitie Security Ltd* [2010] IRLR 288 acknowledged that this was not an “easy issue to resolve”. The Working Time Directive 2003/88 provided that all workers should be entitled to at least 4 weeks’ paid annual leave. This was implemented by the Working Time Regulations 1998 which also set out the notice required to be given to the employer by the employee of his intention to leave, and the notice to be given by the employer to the employee where leave is being refused. The statutory provisions relating to notice can be varied by the employee’s employment contract. However, what happens if an employee is prevented from taking his annual leave because of the notice provisions? Does he thereby lose his right to take statutory holiday entitlement?

In *Lyons v Mitie Security Ltd*, Mr Lyons worked as a security officer for Mitie Security Ltd. He was paid by the hour and there were no minimum hours set by the company. His employment contract provided him with 4 weeks’ paid holiday. It also stated that applications for leave had to be made on the company’s holiday request form and had to be submitted, “wherever possible” at least 4 weeks before the start of the holiday. However, the company would consider applications made on shorter notice depending on the merits of the case and staffing requirements. By the beginning of March 2008 (his holiday year ended on 31 March), Mr Lyons had 9 days’ holiday left and had no work scheduled for the rest of the month. He therefore sent a fax to his employer, on 6 March, asking for his holiday pay. On 1 April, he had not received the holiday pay and he therefore sent a grievance letter to the company. A grievance hearing was held and Mr Lyons complained about the holiday pay and other issues such as bookings being cancelled and being barred from some clients’ premises. He had made a number of complaints over the years concerning these issues. With

regard to the holiday pay complaint, his employer responded by pointing out that he should have given at least 4 weeks notice, that holidays could not be carried over and that it was not possible to provide holiday pay whilst he was still working. Mr Lyons resigned and claimed constructive unfair dismissal and the outstanding holiday pay, the failure to provide the holiday pay being the “last straw”.

The case went to the EAT which had to decide whether an employee had an inalienable right to the statutory paid annual leave, or whether notice requirements, statutory or contractual, could override this right. As Judge Ansell stated, “...is the employer legally obliged to permit an employee to take all of his paid leave within the leave year even if requested by the employee towards the end of the leave year at a time when it may not fit in with the staffing patterns of the business.”

The EAT decided that the employee does not have an inalienable right to statutory leave. The right to time off is subject to the statutory notice requirements and these provisions operate throughout the leave year, even if this results in an employee losing holiday entitlement. However, the EAT also noted that an employer should not use the notice provisions in an “unreasonable, arbitrary or capricious way so as to deny any entitlement lawfully requested.” The case was therefore sent for a rehearing since the employment tribunal had failed to deal correctly with the claim for constructive unfair dismissal particularly with regard to holiday pay.

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