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Albion Chambers EMPLOYMENT NEWSLETTER

At a glance

A recap of recent changes in Employment law

This year has seen a flurry of Statutory and Regulatory changes in the area of employment law such that busy practitioners may benefit from an at a glance overview of the most significant.

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014

For transfers that took effect on or after 31 January 2014:

- *Service Provision Changes:* the service involved must be "fundamentally or essentially the same" as before the transfer.
- *Collective agreements:* terms contained within collective agreements will be frozen at the point of transfer and may be renegotiated twelve months after the transfer, provided changes are no less favourable overall to employees.
- *Contract changes:* unilateral changes that would have been permitted if there had not been a transfer (e.g. changes to duties, job titles, or under a mobility clause) are allowed.
- *Dismissals:* the 'connected with' qualification will be dropped.
- *"ETO" defence:* a change in the location of a workforce may now be an ETO reason.
- *Consultation:* pre-transfer consultation by the transferee with representatives of transferring employees may count towards the collective redundancy consultation obligations.

For transfers that took effect on or after 1 May 2014:

- *Employee liability information:* the deadline for providing such information is increased from 14 to 28 days before the transfer.

For transfers that took effect on or after 31 July 2014:

- *Consultation:* micro-businesses (those with 10 or fewer employees) may inform and consult directly with employees when there is no recognised union or existing employee representatives.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (effective date 10 March 2014)

Most 'rehabilitation periods' (the period of time during which individuals have to declare criminal offences to prospective employees) are reduced.

The Automatic Enrolment (Miscellaneous Amendments) Regulations 2013 (effective date 1 April 2014)

The time period available for employers to auto-enroll eligible employees into a qualifying pension scheme was extended from one month to six weeks.

Enterprise and Regulatory Reform (ERR) Act 2013 (effective date 6 April 2014)

- *ACAS conciliation:* Claimant employees have to submit details of their dispute to ACAS before they can issue a claim in the Employment Tribunal. They will be offered early conciliation for a month, which can be extended by two weeks, and the time limit for presenting a claim will be extended. If conciliation is refused by either party or does not succeed, the employee will be able to present his or her claim.
- *Discrimination questionnaires:* The questionnaire procedure has been abolished. (However, employees are still able to ask questions and the answers, or lack of them, may be taken into account by the Tribunal. ACAS has published guidance on how to deal with requests).

Employment Rights (Increase of Limits) Order 2014 (effective date 6 April 2014)

Tribunal compensation limits have risen in line with inflation:

- The maximum compensatory award for unfair dismissal is £76,574 (or 52 weeks' pay if less).
- A week's pay for calculating both the basic award for unfair dismissal and statutory redundancy payments will be £464.
- The maximum basic award or statutory redundancy payment will be £13,920.

Moreover:

- If the Tribunal considers that there are 'one or more' aggravating features, there is a power to impose a financial penalty on employers at 50% of any subsequent award subject to a minimum of £100 and a maximum of £5,000. It is payable to the Exchequer (not the claimant) and can be reduced by 50% if payment is made within 21 days. Genuine mistakes should not be penalised and Tribunals are required to take account of the employer's ability to pay.
- The bar for 'aggravating features' is considerably lower than in discrimination cases. The guidance in the Explanatory Notes provides a non-exhaustive list of factors but states that Tribunals are more likely to impose penalties where "the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resource team, or where the employer had repeatedly breached the employment right concerned."

The Welfare Benefits Updating Order 2014 (effective date 6 April 2014)

- The prescribed rates for statutory maternity, paternity and adoption pay increased to £138.18 per week.
- Statutory sick pay (SSP) rose to £87.55 per week.
- SSP record-keeping obligations have been abolished. Employers now have the flexibility to keep sickness absence records in a manner that best suits their business needs.
- Employers are no longer able to reclaim SSP from HMRC.

Immigration (Employment of Adults subject to Immigration control) Maximum Penalty) (Amendment) Order 2014 (effective date 14 May 2014)

- The maximum penalty for employers

who employ illegal migrant workers (workers who do not have the right to live or work in the UK) has doubled from £10,000 to £20,000.

Children and Families Act 2014 (effective date 30 June 2014)

- The right to request flexible working has been extended to all employees with 26 or more weeks' service. They do not need to be parents or carers in order to apply.
- Employers no longer have to follow the current statutory procedure and will be able to use their own HR procedure instead. However, they have to deal with requests reasonably and respond within three months.

Finance Act 2014 (effective date 17 July 2014)

- A new Health and Work Service has been introduced to carry out state-funded occupational health assessments for employees who are off sick for four weeks or more. The aim is to get employees back to work more quickly.
- GPs or employers will be able to refer employees and the service will give advice to both employers and employees.
- If an employee fails to engage with the service, no further notes certifying sickness absence can be issued so employees will lose their SSP.
- The scheme will be gradually phased in between October 2014 and April 2015.

The raft of changes seen in 2014 may not yet be over. The Deregulation Bill 2014 – which will , among other things, remove powers granted to Tribunals' under the Equality Act to make wider recommendations in discrimination claims – is currently awaiting Royal Assent. Likewise, the Transfer of Employment (Pension Protection) Amendment Regulations 2013 – ensuring that pension contributions paid by the transferee match those paid pre-transfer – is currently awaiting an implementation date. And that's before we even get onto the Children and Families Act 2014 which will introduce far reaching changes to parental/maternity/adoption leave sometime in 2015.

Whatever political persuasion a busy practitioner may be, perhaps all can unite in the hope that in a general election year the rate of change may diminish. Depending on the result, of course, much of the above may be repealed and we already know from their Conference earlier this month that a new Labour Government will "scrap" the Government's employment tribunal system and replace it with "a fairer system to ensure that affordability is not a barrier to employees seeking redress in the workplace". As to what that means, watch this space.

Jason Taylor

Striking out a case under Rule 37

Rule 37 sets out five routes by which a claim may be struck out (either on the initiative of the Tribunal or the parties):

(a) It is scandalous or vexatious or has no reasonable prospect of success;

(b) The manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious;

(c) Non-compliance with the Rules or an order of the Tribunal;

(d) It has not been actively pursued;

(e) It is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

Under Rule 37(2), a reasonable opportunity must be given to the respondent to the application to make representations. The Tribunal may strike out a case in a Preliminary Hearing under Rule 53(1)(c). Applying Rule 54, 14 days notice is required, although Rule 5 provides flexibility. Rule 56 says that consideration of striking out a case shall be held in public.

37(1)(a) Vexatious Applications; No Reasonable Prospect of Success

The burden is on the party making the application. The Tribunal should – and will – always consider alternative solutions; (e.g. requiring an amendment to the claim; order payment of a deposit) and applicants must be able to address these alternatives in their arguments owing to the high test for strike out.

A strike out under 37(1)(a) will only be in 'exceptional' cases; *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330. The test is a high one; the case must have no reasonable prospect of success; *Balls v Downham* [2011] IRLR 217. Importantly, Tribunals should not strike out a case where there is the 'crucial core' of undisputed facts. This was considered in *Anyanwu v South Bank Student Union* [2001] UKHL 14; the Court said that cases should only be struck out in the 'most obvious and plainest of cases' noting particular caution is required in discrimination cases given their fact sensitive nature. However, this is not to say that discrimination cases cannot be struck out; *H Patel v Lloyds Pharmacy Ltd* [2013] concerned the striking out of a disability discrimination claim. Taking P's case at its highest, there was no reasonable prospect of success. Whilst a draconian step, there was nothing to prohibit a Tribunal from taking that step. There was no principle that every disability discrimination case that turned to any extent upon oral evidence had to be allowed to proceed because "something may turn up".

37(1)(B) The manner of conduct is unreasonable, vexatious etc.

Striking out a case under Rule 37(1)(b) raises different considerations. In particular, whether the remedy is proportionate to the wrong complained of. The key issue is whether a fair trial is possible. The issues identified in *Blockbuster Entertainment Ltd v James EWCA Civ* [2006] were (i) unreasonable conduct in the form of a deliberate and persistent disregard for required procedural steps (ii) the unreasonable conduct has made a fair trial impossible. If satisfied of either, then the Tribunal must ask; 'is striking out the case a proportionate response?' Where procedural steps have been ignored, before striking a case out, the Tribunal should first consider alternative solutions (such as an Unless Order or a Costs Order). If the unreasonable conduct related to a discrete aspect of a case, then consideration should be given to striking out only that aspect of the case. In *Blockbuster*, the claimant's conduct was quite exasperating, involving a wholesale failure to comply with orders along the way. Having been given every opportunity to exchange documents, he arrived at Blockbuster's solicitors, but refused to let them be copied (saying he was ill). He finally turned up at the hearing with his documents, an amended statement and a tape recording. Whilst the claimant was 'difficult, querulous and uncooperative', an examination of the amendments might have shown they were not important. Regarding the documents, *Blockbuster* probably had them all along. As for the tape, rather than striking out the entire case, the Tribunal might have simply prevented him from relying on it.

Blockbuster was considered in *R Voralia v J Osowski* [2013]. R's ET3 response was struck out for his deliberate and persistent failure to comply with an order to disclose documents. O claimed he had been dismissed for making a protected disclosure about his employer to the Revenue. The Tribunal ordered R to disclose documentation related to tax matters, R did not comply. R's ET3 was struck out and it was debarred from the proceedings. It was found that no good cause or excuse had been given and an adjournment was disproportionate to the modest value of the claim. R said a costs or preparation order was the appropriate

sanction. This was a deliberate disobedience of a significant Court Order, there had been no indication that it would be complied with, R gave no reason for non-compliance and had not requested an adjournment. The order went to the heart of the issue before the Tribunal. The sanction was not disproportionate.

Blockbuster was applied again (with a different outcome) in *A Ahmed v Bedford Borough Council* [2013]. A racial/religious and disability discrimination case; the claimant had wilfully failed to comply with a Medical Examination Order. In striking out the claim, the judge failed to address the critical questions of whether a fair trial was possible or the strike-out proportionate. Further, he had not considered taking a draconic line solely in relation to the disability discrimination claim, the remaining claims not being dependent on the medical examination. Whilst C's conduct was scandalous, unreasonable or vexatious, the judge had not addressed in terms the critical question of whether a fair trial was possible. Moreover, in relation to whether the strike-out was proportionate, the judge had not considered an Unless Order first.

Striking out a claim where it has not been actively pursued 37(1)(d)

In *G Elliott v Joseph Whitworth Centre Ltd* [2013], the issue was whether a fair trial was still possible. E was represented by his trade union, his claim was presented to the Tribunal who then failed to process his claim. E's representative did not chase up a response for over 21 months. E's claim was struck out. The judge could not be criticised. The respondent said it could not adequately defend itself because of the passage of time. The judge examined the force of that argument because E had said that he kept notes of the relevant meetings. She decided that much depended on the memory of the relevant officers and they did not have notes. The fact that people had left the organisation or gone abroad was not necessarily a reason why there could not be a fair trial, but fading memory was. The judge considered the draconian issue along with the balance of prejudice. The Court was looking for something about the case before it, such as memories fading, documents and witnesses going missing, the business becoming insolvent, a change of representation and cost. In E's case the judge had considered those relevant matters and correctly concluded that the delay was inordinate and inexcusable.

In *Rolls-Royce Plc v Riddle* [2008] IRLR 873, a further basis on which a claim might be struck out was considered; namely an 'intentional and contumelious' delay by the claimant. The test then is whether it is just to allow the claim to continue.

Paul Cook

Share transfers and TUPE

The correct approach

Smith and others v Jackson Lloyd Ltd and another UKEAT/0127/13/LA.

Jackson Lloyd Ltd ('JL') was engaged in the repair and maintenance of social housing and had a series of contracts with social housing providers. By September 2010 JL found itself in severe financial difficulties and on 1 October 2010, Mears Ltd ('ML') a subsidiary company of Mears Group Plc ('MG'), purchased JL's shares in their entirety. Following the share transfer, the JL board resigned and was replaced by MG nominees, who informed JL employees that MG had acquired JL and that it was embarking on a 'programme of integration'. Various strategies were implemented to ensure that JL's business and methods were integrated into those of MG and the business was managed by an 'integration consultant', appointed by the CEO of MG. In addition, JL's CEO and Contracts Director were dismissed soon after the share transfer - both of whom had been the controlling minds of JL before acquisition.

At the first instance, the Tribunal found that for the purposes of the Transfer of Undertakings Protection of Employment Regulations 2006 ('TUPE'), control was exercised by MG and not JL or ML and that from 1 October 2010 JL was nothing other than a trading name, despite the fact that for commercial reasons and to protect JL's contracts, the impression being given was that JL was autonomous and distinct from MG. The dismissal of staff and redundancies were dealt with entirely by MG without any regard for JL's internal processes or responsible personnel. The Tribunal also determined that there had been TUPE transfer under Reg 3(1)(a) from JL to MG and that the board of JL did not intend to transfer its management function to a contractor, therefore, this was a not a service provision change, but a takeover. The Tribunal clarified that the acquisition of JL's shares by ML was a genuine share transfer, although did not amount to a TUPE transfer to ML, but rather provided the context within which MG began to operate JL's business, which triggered the provisions of TUPE. The tribunal determined that the claimants had locus and were entitled to bring protective award claims in their own names.

The appellant companies JL and MG appealed against the Employment Tribunal's decision on three grounds. First, that there had been a TUPE transfer under Reg 3(1)(a) on the basis that the correct legal test had not been applied; secondly that it had erred in finding that the transfer was to MG and not to ML, its subsidiary; and thirdly, that the individual claimants had locus and were entitled to bring protective award claims in their own right. The Employment Appeal Tribunal ('EAT') dismissed the appeal and held that there had been no error of law in the Tribunal's reasoning or conclusions on either the transfer or locus points.

In relation to the TUPE transfer, the appellant argued that the Tribunal had carried out an inadequate analysis of the main factors, and referred to various ones which it claimed the tribunal had not properly taken into account. The EAT disagreed and emphasised that the examination required under Reg 3(1)(a), 3(2) and 3(6) TUPE was broad, multifactorial and fact sensitive and that it was necessary to take into account all the facts in order to determine whether there had been a transfer and whether the undertaking had continued and retained its identity in different hands. The EAT referred to the list of relevant factors set out in the case of *Cheesman v Brewer Contracts Ltd* [2001] IRLR 144, but held that it was not exhaustive or a 'check list' where each factor must be considered separately and that it was unnecessary for the Tribunal to refer to all the arguments and evidence in its judgment. The EAT took the view that the appellant was not seeking to advance a 'perversity' argument on appeal and yet was seeking effectively to re-argue the facts and challenge the Tribunal's assessment of the evidence.

In relation to the transferee point, the appellant argued that the claimants brought their case on the basis that that the share purchase agreement had been the TUPE transfer, which would mean that the correct transferee was ML and not MG. The EAT held that this ground of appeal was misconceived and that the case advanced by the claimants in the first instance was not that the share sale itself constituted a TUPE transfer, but that it triggered a separate TUPE transfer to MG and the fact that the shares in JL were acquired by ML, being MG's subsidiary, did not preclude a TUPE transfer of JL's business to MG. The

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EAT clarified that the case of *Print Factory (1991) Ltd v Millan* [2007] EWCA Civ 322 was not authority for the proposition that a share sale itself is a transfer, which it noted would be inconsistent with the decision in *Brookes v Borough Care Services* [1998] IRLR 636.

In relation to the locus point, it was agreed that the claimant members of the relevant union were able to pursue their claims via that route and that the union had locus. The dispute was in respect of the remaining claimants. The Tribunal held that as of 1 October 2010, there were no elected representatives authorised to deal with consultations matters and TUPE issues and that the claimants were therefore entitled to pursue individual claims in accordance with Reg 15 TUPE. The JL Employee Representative Committee Terms of Reference stated that the term of office of each elected representative was 12 months; that the first election of the newly formed committee would be held in August 2009 and that individual representatives would face re-election or replacement on an annual basis thereafter. Save for one of JL's five sites, there were no employee representative elections or nominations after August 2009 and the Tribunal made findings as to the expiry of the representatives' mandate in each case. The appellant argued that the suggestion in JL's Employee Representative Committee Terms of Reference, that employee representatives would 'normally' be expected to serve for an initial year contemplated that that they would serve for longer than 12 months, and that a purposive interpretation of Reg 13 and 14 TUPE would have resulted in a finding that those whose term of office as employee representatives had expired were, nevertheless, competent representatives within the meaning of Reg 13(3)(b)(i) TUPE and, therefore, had locus to claim on behalf of the individual claimants. The EAT disagreed with that analysis and dismissed this last ground of appeal on the basis that there was no evidence that consent to the representatives continuing to act after the expiry of their terms of office was sought or obtained, and that at the relevant time there were no representatives with authority from the affected employees to receive information and to be consulted on a TUPE transfer. The appeal was dismissed in its entirety.

Monisha Khandker