

EMPLOYMENT LAW UPDATE

June 2010

WHAT'S NEW.....

THE BUDGET 2010— EFFECT ON EMPLOYMENT

The new government has this month announced the new budget. This follows on from the announcements made by Mr Darling in March 2010 (please see the March 2010 update for information).

The new Budget has kept and extended some of the ideas from the March 2010 Budget and has provided some new ideas which will have a direct impact on employers. A few of the main issues for employers are discussed below;

Default Retirement Age ('DRA')

Mr Osborne announced in the budget that he intends to increase the age for claiming a State Pension. This will now increase to 66, with plans to increase the age further in the future.

The government has therefore considered the implication of the DRA, currently 65, and advised that they intend to phase out the DRA from April 2011. This may have a direct effect on employers with the Haulage and Coach industries given the requirement for an employee to renew his licence every year following the age of 65. Employers may therefore need to adapt procedures accordingly.

Deregulation of Employment Law

As many employers will be

The 2010 Budget hopes to start the Deregulation of UK Legislation

aware, employment law is constantly changing, whether this is by case law or by the introduction of new legislation.

Mr Osborne and the Coalition government intend to reduce regulatory costs and therefore intend to implement a "one-in-one-out" policy for new legislation. This is exactly how it sounds. The government have confirmed that they will not enact any new legislation unless one is also cut.

In support of this, the government intend to implement "sunset clauses" within regulations, which means that they will cease to be law after 7 years unless Parliament "confirm the regulation is still necessary and proportionate, or the Regulation is explicitly set for a longer period".

It will be interesting to see how this is implemented in practice however, it was confirmed within the Budget that there would be an immediate review of employment law. It was detailed in the Budget that such review was necessary "to ensure maximum flexibility, protect fairness and promote competitiveness. Changes to employment law will be made as part of the Governments one-in-one-out approach to regulatory reform".

Employers should therefore brace



themselves for change, with new provisions possibly taking effect as early as October 2010 or April 2011.

National Insurance Contributions

As stated in the March 2010 Budget, the Government planned to increase NICs by 1%. It was anticipated that such increase would cost firms in the region of £4.5 billion a year and may even cost 57,000 jobs within UK.

The new Budget have accepted and implemented these changes which are to take effect from April 2011. However such implementation has coincided with the Government's plans to reduce the cost of retaining and hiring staff.

To do this, Mr Osborne announced that the threshold for NICs will increase by £21.00 per week above indexation. This they hope will result in the number of employees for whom the employer is to pay no NICs will increase by up to 650,000 employees.

Further Changes

The Government also intends to PAYE. They want to introduce a system (in consultation with employers and payroll providers) to provide a more real-time system for PAYE data.

The importance of this is established by the additional powers that the Government intends to give the HMRC in collecting PAYE and NIC. The Government intend to start consultation on introducing powers for the HMRC to require financial security where PAYE and NICs are at a serious risk of non-payment and may include a criminal penalty for non payment. Whilst further information on this is not forthcoming, employers need to be aware of this.

Whilst the Budget may not have effected Employment greatly at this stage, the changes are coming and will have an impact.



When does TUPE apply? The EAT has furthered recent case law which is continually clarifying the position

In the Pipeline...

.....

New Regional Employers to be given bonus exemption

The Government has announced in the Budget that New Businesses will be exempt from the first £5,000.00 of Class 1 National Insurance Contribution due in the first 12 months of employment within certain regions of the UK.

The Government has targeted areas such as the North West, North East, Northern Ireland, Scotland, Wales, East and West Midlands amongst others for this promotional scheme. The scheme is intended to promote the start of new businesses within these regions which have been identified as dependent on public sector jobs and they want to develop businesses in these areas.

It is proposed at this stage that the scheme be introduced as early as September 2010.

CASE BULLETIN

Ward Hadaway Solicitors v Love, Scott & Capsticks Solicitors

The Employment Appeals Tribunal has considered and held that substantial "run off" of contract, where there has been a service provision change is sufficient to change the nature of the activities and therefore there was no transfer of employees under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

In this case, Ward Hadaway Solicitors ('WH') provided legal services for the Council, however there was no actual obligation on the parties to undertake or supply work to each other. The Council therefore decided to tender its work to a single provider. Love, Scott & Capstick Solicitors ('LSC') were the successful firm. This effectively ended the relationship between WH and the Council and no new work was sent to WH. However, WH continued with the cases that they already had.

Under the provisions of TUPE in order for there to be a service

provision change under Regulation 3(3); there is an organised group of employees situated in Great Britain, which carries out activities on behalf of the client and these services are to be carried out by the transferee. The Tribunal was asked to determine whether this was the case.

When considering the services provided, the Tribunal accepted that there was an organised group of employees but asked itself the question what those services were. It was determined by the Tribunal that the obligation to provide further work did not constitute activities under TUPE. This was supplemented by the fact that the services changed as a whole as the Council took part of the duties performed by WH in-house. The Tribunal therefore concluded that there was no service provision change under TUPE.

The matter was appealed and the EAT were asked to determine the question previously asked to the Tribunal. The EAT on consideration of the evidence, found that the Tribunal had been correct to find that there had been no service provision change and refused leave to appeal the decision.

CASE BULLETIN

Comments

This case supplements the case of *Metropolitan Resources Limited v Churchill Dulwich Limited* (see the September 2009 Update), which states that where the services are “fundamentally or essentially” the same then a service provision change will occur.

It is clear from the outcome of this case that it is a question of fact whether the contracting out of services will constitute a service provision change. The special circumstances in this instance for the EAT concluding that there had been no service provision change were;

1. There was no written agreement, therefore it could be established that there was no ongoing duty to supply future work;
2. The continuation of the duties by WH.

If there had been, throughout the conduct of matters between WH and the Council, an obligation to provide future work and all matters had transferred to LSC immediately then the EAT would have ruled in favour of a service provision change.

Given the current economic problems that are currently being experienced, the provisions of TUPE more than ever may apply to your business. It is therefore essential that these provisions are simply not ignored. As an employer you are under a duty to consult your employees and further if you have obtained a contract you may be under a duty to take on a number of employees. You may therefore ask what this case can tell you about TUPE. The simple answer is that each case is to be decided on its own facts and as can be shown from this case and the *Metropolitan Resources* case



Where making any variation of contract you should make sure you have the signed agreement of the employee

there can be a fine line between TUPE applying or not.

CASE LAW BULLETIN **CONTINUED ...**

Khatri v Cooperatieve Centrale Raiffeisen Boerenleenbank, BA

The Court of Appeal in the above case held that the Claimant was entitled to his performance related bonus even though the clause relating to the bonus had a discretionary element.

The origins of this case are based around the contract of employment and changing of the terms and conditions of that employment. It was originally part of the Claimant's contract that in addition to his basic salary, “any additional bonuses are made entirely at the discretion of the bank”. The Claimant was unhappy with the terms of this agreement and it was agreed between the parties that this clause would be varied and the Claimant would be entitled to a guaranteed bonus and if he did not resign or was not dismissed for gross misconduct, he would receive a further bonus representing 12% of income generated. The bank did however draft the clause saying that they had the “right to remove or review this

arrangement at any time”.

Following this, the Claimant was subsequently moved to a different department, although he did the same work and worked from the same desk. Upon this move, the bank made further amendments to the Claimant's contract of employment. They added restrictive covenants and replaced the previously agreed bonus arrangement with a discretionary performance related bonus. It is important to note that this arrangement was done by letter.

During the course of his employment, the Claimant did raise an issue with the changes to his contract arguing that they were not effective. Before the matter was resolved, the Claimant was made redundant and therefore submitted a claim for his bonus.

The Court of Appeal was asked to determine whether the Claimant had a right to his bonus and also whether the change to his contract had been accepted by conduct. The Court of Appeal held that the Claimant was entitled to a bonus as the words of the final amendment were ambiguous and the only reasonable way to read the clause was that it applied for 2008 and could be amended in

CASE BULLETIN



Can the Employer commit a breach of the implied term of mutual trust and confidence even when the act is not aimed at the aggrieved party?

the future. The CoA rejected that the terms "at any time" meant that it was discretionary.

In addition, the CoA held that given the following the change of employment, the Claimant had continued to carry out the same work on the same rate of pay and therefore had not accepted the changes to his contract by conduct. The CoA in making these observations noted that the letter detailing the amendments had not been signed and nor had he been asked to do so.

The bank also argued that there had been no immediate impact on the change and therefore just because the Claimant had not raised the issue immediately did not mean that the changes were accepted.

Conclusion

The implications of this decision may have a substantial effect on your business. A number of businesses may be thinking of amending contracts of employment and/or considering whether to pay bonuses or not. This should be carefully considered.

This case highlights the importance of obtaining the employee's agreement to any changes to their contract of employment, especially where they are to the detriment of the

employee. In this case the Claimant was held not to have accepted the changes to his bonus scheme through conduct and this cost the bank 1.6 million Euros. Whilst the cost to your businesses may not be this excessive, it is important that the risk is not taken. The bargaining power of an employer and its employees is massively different and where there is no clear agreement problems may arise further down the line.

In addition, this case highlights that the clauses relating to discretionary bonuses may need review. If there is any ambiguity, the Courts have shown that they are willing to award in favour of the employee and employers should be careful with this. Should you have any issues relating to this, please do not hesitate to contact our team of experts.

CASE BULLETIN ...

Hunter v Timber Components (UK) Limited

The EAT in this case were asked to determine whether or not an employer could commit a breach of contract even where the conduct is not directly aimed at the aggrieved party.

The facts of this case are simple, the Claimant became concerned by the way a Director was

treating other employees. The Claimant in fact confronted the Director about his attitude, he also approached the owner whose son it was acting inappropriately. No action was taken and the situation again flared up and resulted in a verbal altercation between the Claimant and the Director, which resulted in the Claimant being signed off on sick leave on account of nervous disability.

The Claimant subsequently brought proceedings against his employer for constructive dismissal claiming that the Director's attitude towards others had breached the implied term of mutual trust and confidence. The Tribunal originally held that the Claimant had made it clear that the actions of the Director were aimed at others and therefore rejected his claim.

The EAT on review of the facts had no reason to overturn the decision of the Tribunal however, they did comment that just because the act of an employer is not aimed at the aggrieved does not mean to say that it can breach the implied term of mutual trust and confidence. The EAT did however say that each case would have to be considered on the facts.

Comments

Whilst the actions in this case did not amount to a breach of the implied term of mutual trust and confidence, employers should give thought to how the management styles are perceived by their employees. This case suggests that the aggrieved employee does not have to receive the treatment, but where it can be established that the treatment of others has affect the aggrieved, this may give rise to a Tribunal claim.

For further information relating to any of the above, please do not hesitate to contact one of our experts on 01254 828 300 or visit our website at www.backhouses.co.uk.