

# EMPLOYMENT LAW UPDATE

September 2009

## WHAT'S NEW.....

### **SOCIAL NETWORKING AND ITS EFFECT ON THE EMPLOYER**

More and more people are using social networking sites such as Facebook, Twitter and My Space to communicate information about their social and work lives. Whilst you may not consider these sites as a big issue in employment, more and more employers are finding that the use of these networking sites can have a detrimental effect on their business.

The use of these networking sites can have an impact on an employer's business in a number of ways and some examples include:

- Time wasting;
- Damage to the company's reputation;
- Disclosure of confidential information;
- Bullying/harassment of work colleagues; and
- Discrimination in recruitment.

If any of the above occurs, employers may need to take action against their employees. It is therefore essential that employers know what rights, if any, they have to monitor the use of these networking sites.

The Data Protection Act 1998 provides a certain amount of protection to employees' rights to use these sites. However, the Human Rights Act (HRA) provides rights for employees which include the right to privacy and freedom of

*The use of networking sites like facebook are increasing and employer's should be aware of the impact on their business's.*

expression. If an employer is looking to limit the use of these sites, it should consider whether it is violating these rights. It would appear as though any restriction of an employee's rights would contravene Human Rights legislation and therefore cannot be permitted. However, under the HRA such rights are not absolute rights and are governed by the doctrine of proportionality. Therefore if an employer can show that managing the use of these networking sites will offer protection to its business and its employees then it is likely that no employee rights will be violated.

### Impact on the Workforce

It is becoming more and more common for employees to use these sites to post comments about their working life and in some instances this may require disciplinary action. For example if an employee uses a networking site to post comments about a colleague that could constitute harassment then the employer should take action. An employer is vicariously liable for the actions of its employees and therefore employers should consider disciplinary action and in most instances at least have a full investigation into the allegations.

The sanctions imposed on an employee who is found guilty of harassment/bullying through a

social networking site should be no different to the sanctions imposed on an employee found guilty of those offences within the workplace. An employer should therefore inform all employees that the use of networking sites (in a way that could cause harm to the company or its employees) will not be tolerated. Consideration should also be given to amending examples of misconduct/ gross misconduct in employment contracts or employee handbooks and we can assist in this regard.

### Pre Employment Use

The significant increase in the popularity of these networking sites may tempt an employer to access the sites when considering an application for employment. It should be noted that an employer wishing to use these sites in this way is at risk of a Tribunal claims.

These sites contain extremely personal information which would not usually arise in a job application. Examples include sexual orientation and religious beliefs and therefore using these sites to the detriment of an applicant for employment may result in a discrimination claim.

Employers should always consider the effects and reasons for monitoring the use of such sites to make sure it is a proportionate way of safeguarding any risk to their business.



## In the Pipeline...

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### Increasing the right to Parental Leave

On 30 July 2009 the European Union accepted a proposal to increase the amount of parental leave to which an employee is entitled and further extend this right to all employees.

The European Commission having accepted this proposal has set a Framework Directive, which is awaiting approval from the Council. It is however thought that this Directive will be applied by all member states.

Under the terms of the Maternity and Parental Leave Regulations, an employee is currently entitled to request 13 weeks' (3 months) unpaid parental leave as long as they satisfied certain criteria. These criterions included but are not limited to the employee having had one year's continuous service and has responsibility for a child.

The new proposals, if implemented by the UK, will have the following effect on an employees right to take parental leave:

- Increase the amount of leave to 4 months;
- Expressly allow parents the right to request changes to their working patterns;
- Will include those employees who are contracted on a part-time, fixed-term and agency basis;
- Give the parent the right to claim less favourable treatment on the grounds that they have taken parental leave.



*If implemented in the UK employers will see an increase in the amount of parental leave allowed for employees*

The proposals will adapt and expand the rights of all employees to request parental leave which is likely to impact on an employer's business. We will of course keep you updated as to the progress of this directive.

when a relevant transfer takes place. A relevant transfer is basically when an operation or service transfers to another operator. If the terms of TUPE apply an employee will transfer to the new operator on the same terms and conditions of employment as they were on at the time of the transfer.

## CASE BULLETIN

### **Metropolitan Resources Limited v Churchill Dulwich Limited and Others**

The EAT upholds the decision of the ET relating to rules on 'service provision changes'

This matter was originally presented to the Employment Tribunal to decide whether a service provision change had occurred and whether a transfer had occurred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

TUPE provides protection to employees and seeks to preserve their continuity of employment

The circumstances surrounding this claim were that a company (MH) were contracted to accommodate asylum seekers for the Home Office. In order to do this they contracted a separate company (CD Limited) to provide the accommodation. MH, having provided a successful period of service to the Home Office, decided not to renew the contract with CD Ltd and contracted with MR Ltd who provided a new location to accommodate the asylum seekers. MH who had provided workers to help the CD Ltd employees with the asylum seekers, moved their employees to the new location. During this period CD Ltd required its employees to continue to work until all asylum seekers had left the accommodation. A letter was sent by CD Ltd to MR Ltd confirming that these 10 employees transferred under the

## CASE BULLETIN

provisions of TUPE. When the 10 employees turned up at MR Ltd's premises, they were sent home.

The Employment Tribunal in the first instance concluded that a service provision change had occurred. The Employment Appeals Tribunal (EAT) on appeal had to reconsider the position and decide whether a service provision change occurred under Regulation 3 (1) (b) and 3 (3) of TUPE. The EAT considered whether the services provided by MR Ltd at the new accommodation were the same as those previously supplied by CD Ltd for the purpose of TUPE. MR Ltd argued that the services they conducted were fundamentally different, given the shorter length of time that the asylum seekers were allowed to stay in the accommodation and further the different location. The EAT held that the services provided by MR Ltd were fundamentally the same and therefore, a service provision change had occurred.

## Conclusions

There has always been an ambiguity when considering service provision changes and in particular what would constitute a service provision change and whether any change in the service provided would negate the effect of Regulation 3 (1) (b) of TUPE. The EAT in their judgement concluded that the provisions of TUPE are comprehensive and clearly set out the circumstances in which a service provision change occurs. The judgement also notes that if the services provided are fundamentally or essentially the same then a service provision change occurs.

This judgement provides a clearer answer to the application of Regulation 3 (1) (b) albeit



*The EAT concludes that were services provided are fundamentally or essentially the same there will be a service provision change*

each case will be determined on its merits. In the current financial climate with more and more hauliers taking over services from other hauliers, the application of this case could result in a movement of employees under TUPE.

*The provisions of TUPE are extremely complex and can complicate business and service transfers and in the current climate the provisions of TUPE are becoming more and more of an issue. If you are unclear as to the impact of TUPE please do not hesitate to discuss the matter with one of our experts.*

***Hartlepool Borough Council v Llewellyn and Others; South Tyneside Borough Council v McAvoy and Others; Middlesbrough Council v Ashcroft and Others***

### Piggybacking an Equal Pay Claim is valid

Under section 1 Equal Pay Act (EPA), there is an implied term into a contract of employment which modifies the terms of employment that are less

favourable to a clause in the contract of the opposite sex. The EPA will automatically modify a contract of employment to be no less favourable to that of the opposite sex and that person will be entitled to recover payment in arrears. In order for an Equal Pay claim to be successful the Claimant must show that there is a 'comparator' of the opposite sex, who is employed in work of the same nature who is receiving more money.

This case involved a claim from a group of male workers for equal pay, as female comparators had successfully made a separate equal pay claim. This is known as a 'piggyback' claim.

The Employment Tribunal initially concluded that the Claimants were entitled to bring these 'piggyback' claims although their payment in arrears were limited to the date on which the relevant female comparator presented her claim.

The employers appealed the decision of the Tribunal on the basis that the female comparator had made a successful claim to the Tribunal and this made a material difference between the Claimants and the female comparators. The Claimants also made an appeal of the Tribunal's decision to limit their entitlement to payment in arrears. The EAT

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*The EAT held that a male should be able to present a successful claim for Equal pay by 'piggybacking' a claim of a female comparator.*

therefore had to consider the claim as a whole.

The EAT considered the EPA and concluded that a man should be able to bring a claim as a result of a woman's successful claim for equal pay. The EAT made these conclusions given that under section 1 (2) EPA, if a female comparator is successful in an EPA claim then the Claimants (who were male) would be the subject of less favourable terms in their contracts of employment and should therefore be entitled to bring a claim. The EAT upheld the decision of the Tribunal on this issue.

The EAT further considered the issue of payment in arrears, following a successful claim and concluded that if the Claimants are entitled to an equality clause in their contracts, the terms of those contracts will be automatically modified in accordance with the EPA. Therefore the Claimants would be entitled to payment in arrears from the time when they became employed in similar work to that of the female comparators.

### Practical Implications

The EAT's decision will have a profound effect on the issue of Equal Pay and will only serve to increase the amount of claims being presented to the Tribunal.

It is therefore important that all employers consider the effects of this case and review the rates of pay that are operated in their businesses. Employers should make sure that all employees who are employed in comparative work are being paid equal amounts, unless there is a genuine reason for the difference.

It may also be prudent for employers to make sure that they provide equal opportunities throughout their business. It is advised that there is an equality clause drafted in your employee's contract of employment which will demonstrate that there will be no discrimination on the grounds of an employee's sex.

## PRESS RELEASE

### THE 2010 MOVERS AND STORERS SHOW

The Movers and Storers Show returns in 2010 but with a change of venue! The decision was taken to move **the** major industry event to **The Telford International Centre**, for cost and logistical reasons. To reflect the poor trading conditions for many in both sectors of the industry, it was also decided that for 2010 the show would be held on just one instead of two days.

So for 2010 The Movers and Storers Show will be held in Hall 3 at the Telford International Centre on **Wednesday 17th February**. With excellent motorway and rail links, Telford is an ideal choice of venue to host such a major industry event. Opening times will be 09:30 until 17:00.

Not surprisingly, these changes have led to much lower stand prices – starting from just £396 plus VAT. The Organisers believe this may have led to the huge take up of space from previous and new exhibitors. The Organisers report that by August this year, already over half of the available floor space had been sold.

One of the show Organiser's – Keith Merrett – said '*As the show will be held on just one day we anticipate a large turnout from both movers and storers. So we intend assisting our exhibitors by ensuring they get a some quality time with specially invited clients and trade press and therefore a preview evening, with entertainment, is scheduled for Tuesday 16th February*'.

Additionally there is a choice of three hotels on-site for those wishing to stay over. Each hotel has provided the organisers with a special 'show rate.' With car parking charges 50% cheaper this year, the 2010 Show certainly seems to be about saving money!