



Hewitsons' Employment LEGAL UPDATE

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TUPE & Employee Liability Information

In the recent case of *Born London Ltd v Spire Production Services Ltd*, the Employment Appeal Tribunal (EAT) considered whether the obligation on a transferor under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) to provide employee liability information included an obligation to state whether or not a bonus was contractual.

Regulation 11 of TUPE requires a transferor to provide certain information about the transferring employees (known as the "employee liability information") to the transferee. The information required to be provided includes certain particulars of employment employers are obliged to provide to employees under section 1 of the Employment Rights Act 1996 (s1 ERA 1996).

Born London Ltd (Born) took over a contract from Spire Productions Services Ltd (Spire) which amounted to a service provision change under TUPE. When providing the employee liability information, Spire stated that the transferring employees' entitlement to a Christmas bonus was "non-contractual". Following the transfer, Born realised that the Christmas bonus was likely to be considered a contractual entitlement.

Born issued an Employment Tribunal (ET) claim seeking compensation of £100,000 on the basis that the employee liability information provided by Spire was incorrect. Born argued that the particulars of employment referred to in s1 ERA 1996 were limited to contractual entitlements. As such, by inaccurately stating that an entitlement was non-contractual, Spire was in breach of TUPE as it had not provided the necessary particulars about the transferring employees' contractual entitlements. Spire applied for the claim to be struck out on the basis that it had no reasonable prospects of success

Striking out Born's claim, the original ET held that the particulars of employment referred to in s1 ERA 1996 are not limited to contractual entitlements. As such, Born had no reasonable prospect of showing that Spire had failed to comply with its obligations under TUPE to provide the employee liability information. Born appealed to

the EAT.

Dismissing the appeal, the EAT agreed with the ET that an employee's written statement of particulars of employment referred to in s1 ERA 1996 is not limited to contractual entitlements and there was no obligation to state whether the matters to be set out were contractual or not. Whilst the EAT acknowledged that this interpretation of s1 ERA 1996 permitted a broad approach to the information to be supplied, and may not be clear in terms of whether or not a particular element is contractual, it is open to the transferee to enquire further as part of its due diligence process.

Unfair Dismissal & Poor Attitude to Organisational Change

In the case of *Adeshina v St George's University Hospitals NHS Foundation Trust and Others* the Court of Appeal (CA) held that the dismissal of an employee for gross misconduct due to their poor attitude to organisational change was fair.

Ms Adeshina worked as a senior pharmacist in the prison service and was asked to lead a project that she was opposed to. Complaints were made that Ms Adeshina had behaved unprofessionally during a senior management meeting in July 2011 and had failed to support and lead the project. Subsequently, Ms Adeshina was summarily dismissed for gross misconduct at a disciplinary hearing. Ms Adeshina appealed against the decision to dismiss her, citing race discrimination. Following a re-hearing of the original disciplinary, Ms Adeshina's dismissal was upheld and race discrimination allegations rejected. Ms Adeshina filed various claims including wrongful dismissal, unfair dismissal and race discrimination.

The ET held that there had been defects in the decision making process, namely that the decision to dismiss had been based not only on the events in the senior management meeting but also on matters relating to a continuation of the meeting the following day which had not been put to Ms Adeshina. However, the ET found that the defects in the decision making had been remedied at the re-hearing on appeal and that the appeal panel had been entitled to conclude that Ms Adeshina's conduct merited dismissal for gross misconduct. Further, the ET found that Ms Adeshina had committed a repudiatory breach of her contract of employment and there was no evidence of race discrimination. The ET accordingly dismissed Ms Adeshina's claims.

On appeal the Employment Appeal Tribunal (EAT) agreed with the original ET's findings so Ms Adeshina appealed to the CA. Ms Adeshina alleged that the misconduct was not capable of justifying dismissal as the nature of the allegations were not properly spelled out to her in the letter inviting Ms Adeshina to a disciplinary hearing. Further, as part of the disciplinary process, the appeal panel had made a more serious finding of deliberate insubordination than the disciplinary panel, which was impermissible.

Dismissing the appeal, the CA held that the ET was entitled to find Ms Adeshina's poor attitude to organisational change amounted to gross misconduct and a repudiatory breach of contract. In relation to the disciplinary invite letter, there was no need to categorise the misconduct further and it was clear Ms Adeshina knew the case against her sufficiently to be able to respond. Further, the CA did not agree that the appeal panel's finding was substantially more serious than the original disciplinary panel and, in any event, there had been no increase in sanction. In relation to race

discrimination, whilst there had been flaws in the original dismissal decision, it was found these were down to human error and had been remedied on appeal.

WHAT TO LOOK OUT FOR

General Election & Impact on Pending Employment Legislation

Further to Theresa May's call for a snap general election on 8th June 2017, Parliament will be dissolved on 3rd May 2017. After this date no further legislation will be passed until Parliament is reopened following the election. Any Bills not passed by 3rd May 2017 will lapse and it will be up to the next government to decide whether to present the Bills again and, if so, whether to do so in their current, or an amended, form.

Of main concern regarding the current legislation making its way through the legislative process is the Finance Bill 2017. Amongst other things, this Bill promised to simplify the tax and NICs treatment of termination payments. It would do this by removing the distinction between contractual and non-contractual payments so that all payments made in connection with the termination of employment will be treated as earnings and subject to deductions for income tax and NICs. It was originally proposed that these changes would come into force in April 2018, with the legislative process not being completed until July 2017. However, the current position is that the Bill is likely to be pushed through quickly by 25th April 2017 without amendment and with little opportunity for debate before Parliament is dissolved on 3rd May 2017.

In addition, there are some private members' bills which will not be allocated any further parliamentary time before the election and therefore are likely to lapse. These include the following:

- Workers' Rights (Maintenance of EU Standards) Bill - proposed to safeguard workers' rights derived from EU legislation after the withdrawal of the UK from the EU.
- Gender Identity (Protected Characteristics) Bill - aimed to make gender identity a protected characteristic under the Equality Act 2010 in place of gender reassignment and to make associated provision for transgender and other persons.
- National Minimum Wage (Workplace Internships) Bill - introduced to require the Secretary of State to apply the provisions of the National Minimum Wage Act 1998 to workplace internships.

For more information on any of these updates please contact Nick Hall on 01604 233233 or [click here](#) to email Nick.



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