

# Update

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Solicitors

Welcome to Hewitsons' Employment Legal Update

## What's New

### TUPE: Service Provision Change

In the case of *Salvation Army Trustee Company v Bahi and others* the Employment Appeal Tribunal (EAT) held that an Employment Judge had taken the right approach to identifying and comparing activities before and after a service provision change.

Coventry County Council provided a range of services to homeless people through contracts with various providers. One such provider of "accommodation based support" was Coventry Cyrenions Ltd (CCL), a charity who, following a service user's successful assessment, provided accommodation to those over 18 years' old with the view that the service user would move on to other accommodation in the private sector. The service user was also provided with a support worker who was available from 9:00am to 5:00pm to assist with various tasks. Service users could stay up to a maximum of 2 years but were expected to move on to private accommodation after 12 months and generally did so after 6 months.

Mrs Bahi and three colleagues were support workers in CCL's Adult Services Team in connection with the contract.

The Council decided to merge the services provided to homeless people with those for ex-offenders to provide a single point of access and result in the service user returning to the private sector more quickly. The Salvation Army Trustee Company (SATC) won the tender to provide the merged services.

In contrast to CCL, SATC provided accommodation for service users over 25 years' old. Following assessment some service users could remain in the private sector and be provided with floating support. Others, however, once assessed were provided with a support care plan before being provided with supported accommodation for up to 112 days, the accommodation attended 7:00am to 7:00pm.

CCL, Mrs Bahi and her colleagues, filed an Employment Tribunal (ET) claim arguing that there had been a service provision change and therefore the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applied to transfer Mrs Bahi and her colleagues' employment to SATC. At the ET, when looking at the definition of "activities" the Employment Judge held it should not be too general or simplistic but nor should it be too narrow. It was held that the activities before the change were the "provision of accommodation based support for homeless men and women and the input of a support worker to facilitate the individual returning to private accommodation as soon as possible" which remained fundamentally the same after the transfer therefore TUPE applied.

Dismissing SATC's appeal, the EAT held that the word "activities" should be given its "ordinary, everyday meaning" and that the Employment Judge in the ET had steered "a correct course between the twin dangers of over generalisation and pedantry". As such it was held that the Claimants' contracts transferred to SATC under TUPE.

### **Shared Parental Leave: Indirect Discrimination**

In the first case on shared parental leave, the Employment Tribunal (ET) in *Snell v Network Rail* awarded compensation of just over £28,000 to a father who was not paid the same as his wife whilst on shared parental leave.

Mr and Mrs Snell both worked for Network Rail. They opted to take shared parental leave following the birth of their baby, with Mrs Snell applying to take 27 weeks' and Mr Snell 12 weeks' shared leave (which was later increased to 24 weeks). Network Rail's family friendly policy meant that Mrs Snell would receive 26 weeks at full pay and then 1 week at the statutory rate, whereas the whole of Mr Snell's 24 weeks would be paid at the statutory rate. Mr Snell raised a grievance complaining of sex discrimination.

Network Rail did not uphold Mr Snell's grievance and, as a result, Mr Snell failed an ET claim for indirect sex discrimination. However, as Network Rail did not contest the discrimination claim, the ET only decided on the level of compensation and awarded Mr Snell compensation of just over £28,000, most of which was to compensate him for not receiving full pay during his 24 weeks shared parental leave.

As part of the case the ET heard that Network Rail had introduced a new policy where both mothers and fathers taking shared parental leave are paid at the statutory rate only with no enhancement.

## **WHAT TO LOOK OUT FOR**

### **Employment Tribunals: Introduction of Judicial Assessment**

With effect from 3 October 2016, a procedure of judicial assessment in the Employment Tribunal was introduced. Presidential Guidance entitled 'Presidential Guidance €“ Protocol on Judicial Assessments' was issued by the President of the Employment Tribunal, Judge Brian Doyle, of a procedure which will see Employment Judge's able to give impartial and confidential assessments of strengths and weaknesses of the parties claims at an early stage in proceedings.

Judicial assessment is envisaged to be offered at the first case management hearing and only take place with the parties' consent once the issues in the case have been clarified and orders for the ongoing management of the case have been made. It is believed that the new procedure will be particularly helpful where a party is not legally represented.

The presidential guidance which includes a Q&A sheet can be viewed [here](#).

### **ACAS Guidance**

ACAS has introduced new guidance in respect of marriage and civil partnership discrimination.

Under the Equality Act 2010 employees are protected from discrimination due to marriage and civil partnership. The new guidance, which covers how marriage and civil partnership discrimination can materialise, how it can be dealt with and how to minimise the risk of it occurring in the future, can be viewed [here](#).

For more information please visit our [Employment Services page](#) or [click here](#) to email Nick Hall.



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This Employment Update is produced by Hewitsons for existing clients of the firm to provide them with a useful summary of recent casers, journal reports and dates to be aware of. It is not a definitive statement of the law in any area. Advice should be sought from a solicitor in the Employment Team at Hewitsons in respect of any information contained in this update that affects any individual matter with which you may be concerned.

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