Hewitsons' Employment
LEGAL UPDATE

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TUPE & Service Provision Change

In the recent case of *Tees Esk & Wear Valleys NHS Foundation Trust v Harland and others*, the Employment Appeal Tribunal (EAT) has given guidance on the correct approach to determining the "principal purpose" of an organised grouping of employees in order to constitute a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

In order for there to be a service provision change, immediately before the change there must be an, "organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client".

CE was a patient who initially needed extensive care for severe learning difficulties. A contract for the care was awarded to Tees Esk & Wear Valleys NHS Foundation Trust (Tees). Initially the care involved a large team of 27 people, including the 7 claimants who were unqualified nursing assistants. CE's condition improved to the point where he could move into a flat, at which point the team of carers reduced to 11 people who also looked after others in the same building. The contract for CE's care was put out to tender and Danshell Healthcare Limited (Danshell) won the contract. Whilst Tees alleged that 11 employees were assigned to the contracted care for CE and so would transfer their employment over to Danshell under TUPE, Danshell reluctantly agreed to 7 staff transferring as they had been involved with CE's care for more than 75% of their time. Shortly after their transfer to Danshell, these 7 individuals either resigned or were made redundant, all filing claims for unfair dismissal.

The original Employment Tribunal (ET) held that there had been no service provision change. It found that there had been a change in the provision of care for CE from Tees to Danshell and that there was an organised grouping of employees who had been put together to provide that service. However, as the employees had undertaken other work, and following analysis out of the 375 working hours each work only 125 hours (a third) were required to care for CE, the ET held that the principal purpose of the group had been diluted to such an extent that, by the time of the alleged service provision change, the principal purpose of the group was no longer the care to CE. Tees appealed, amongst other things, on the ground that the ET had erred in its determination of "principal purpose".

The EAT dismissed this ground of appeal and held that the principal purpose of an organised grouping is fact-sensitive. The EAT found that the ET had directed itself correctly that the principal purpose need not be the group's sole purpose and was satisfied that, at the time of the service provision change from Tees to Danshell, the organised grouping's main purpose was providing care to other service users in the building where CE was also based. The EAT

did not therefore see any basis on which to interfere with the ET's decision on this issue.

Religious Discrimination

In the case of *Achbita v G4S Secure Solutions NV*, the European Court of Justive (ECJ) held that a dress code policy which banned employees wearing visible signs of political, philosophical or religious symbols whilst working did not constitute direct discrimination.

Ms Achbita was a Muslim receptionist, employed by G4S Secure Solutions NV (G4S) in Belgium. G4S had a written rule stating, "employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs€¦". Following three years of compliance with the dress code whilst at work, Ms Achbita informed G4S that, in future, she intended to wear a headscarf during working hours for religious reasons. Ms Achbita was later dismissed for refusing to remove her headscarf to comply with G4S's dress code. Ms Achbita filed a discrimination claim with the Belgian labour court who found that there was no direct or indirect discrimination. The decision was upheld on appeal. On further appeal, the Belgian Supreme Court referred the question of whether the headscarf ban amounted to direct discrimination under the Equal Treatment Framework Directive where the dress code prohibited all employees from wearing visible signs of political, philosophical or religious beliefs at work.

The ECJ held that the dress code did not amount to direct discrimination as there was no evidence Ms Achbita was treated any differently to others. However, whilst not required to consider the issue of indirect discrimination, the ECJ indicated that it felt the ban could amount to indirect discrimination.

What To Look Out For

Immigration Rules Change

On 16th March, the Home Office published a statement of changes to the immigration rules. The key changes, effective from 6th April 2017, include:

- Immigration Skills Charge - employers who wish to sponsor non-EEA workers under Tier 2 will have to pay £1,000 per worker per year for large employers or £364 per worker per year for small or charitable employers. Should the charge not be paid in full, applications may be refused.
- Tier 2 (General) - this route is used for non-EEA workers with an offer of a skilled job from an employer with the appropriate sponsor licence which can not be filled by a resident or EEA worker. The changes to this route include the minimum threshold for "experienced" entrants (i.e. those over the age of 26) increasing to £30,000 (from £25,000 currently) and also the threshold for high earners (in respect of whom the employer is exempt from undertaking the resident labour market test) increasing to £159,600 (from £155,300 currently).
- Tier 2 (Intra-Company Transfer) - this route applies to migrants coming to the UK from an overseas branch of the sponsor. The changes include that the sub-category for short-term staff will be closed to new applicants and therefore, with the exception of graduate trainees, there will only be a single Intra-Company Transfer route with a minimum salary requirement of £41,500 per year.
- Immigration Health Surcharge - the health surcharge is £200 per year of the migrant's visa and currently applies to applications under the Tier 2 (General) route. However, from 6th April 2017 the surcharge will be extended to also apply to applications made under the Tier 2 (Intra-Company Transfer) category.

Statutory Rates Increased

The weekly rates for statutory maternity, paternity, adoption and shared parental pay will increase to £140.98 (from £139.58 currently) from 2nd April 2017.

The weekly rate of statutory sick pay will increase to £89.35 (from £88.45 currently) from 6th April 2017.

Employment Status - New HMRC Tool

HMRC have created an online employment status tool which determines for tax purposes (so not for employment law purposes, which can result in a different outcome) whether an individual is an employee or self-employed and whether they might be covered by IR35.

The tool can be accessed here.

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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