Welcome

EMPLOYMENT LAW: GETTING IT RIGHT

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EMPLOYMENT LAW UPDATE

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Proposals and Consultative Documents
Results of consultation on workplace disputes

• Unfair dismissal qualifying period two years from April 2012 (employment up to 5th April one year)
• Employment judges from April 2012 sit alone to hear unfair dismissal cases but see *McCafferty v Royal Mail* where Lady Smith criticised this policy due to its loss of “valuable common sense”
• Emphasis on early resolution of disputes
• Consultation on how to introduce a scheme to provide quicker, cheaper determinations in low value, straightforward claims such as holiday pay
• Power to limit compensatory awards to one year’s pay or national median earnings ie £25,882 whichever is the lowest
Review of tribunals

- Mr Justice Underhill concluded his review of tribunal rules in April 2012
- Mainly technical eg
  - Combining case management discussions and pre-hearing reviews into preliminary hearings
  - Putting cases through an initial paper sift to consider directions and consider strike-out
  - Simplifying rules on default judgement
  - Express power on judges to limit oral evidence
  - Changes to cost rules
  - Redraft of claim and response form
- Changes already made include witness statements not read out but taken as read, expenses withdrawn from witnesses, amount of costs has increased to £20,000
- NOTE SEPTEMBER 2012 PUBLICATION OF CONSULTATION ON CHANGES TO TRIBUNAL RULES
Charging fees

- One of the proposals in the disputes paper related to charging fees to progress a tribunal claim and a consultative document has been issued.
- Two alternative options were put forward. Option 1 was chosen.
- Option one – the fee would depend on the nature of the claim. There will be a fee to initiate the claim and one to proceed with the hearing. Three levels were proposed but two were accepted:
  - Level one unpaid wages and redundancy (£160, £230)
  - Level two unfair dismissal, equal pay or discrimination will have to pay £1200 (£250 when claim lodged and £950 when hearing begins)
- £600 for mediation from a judge, £400 appeal to EAT, £1,200 hearing fee.
Enterprise, Employment and Regulatory Reform Bill

• Protected conversations – highly controversial
• A new term “protected conversations” to allow parties to have a frank conversation about any employment issue without the existence of a formal dispute
• Concerns are raised that this might allow employers to put pressure on employees and to discriminate without this information subsequently coming to light at a tribunal
• The Government’s justification is that employers are stuck with under performing employees because they are afraid to speak to them
• Worries that it could be used to bully staff and bypass agreed procedures
• It might become a shortcut to avoid disciplinary processes
Protected conversations

- Final proposals more restricted
- Employers will be able to offer settlement agreements before a formal dispute arises
- Will be legally protected from offer being used as evidence in a tribunal
- Employees can reject the offer and proceed to a tribunal but will not be able to cite anything from the talks
- Not clear which conversations are protected eg long term conversations about performance but likely to be only in relation to talks about an offer prior to termination
- Proposals talk about “confidentiality of negotiations before termination of employment” (amendment 19 June 2012)
Protected conversations contd

- New section to Employment Rights Act 1996 to provide that when determining an **unfair dismissal** claim a tribunal “*may not take account of any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and employee*”
- Goes further than “without prejudice” conversations as applies even where no formal dispute has arisen
- Includes discussions
- As it relates to a settlement, the employee is free to refuse the settlement but could not bring it up in a tribunal **unless** a tribunal concluded that in its opinion something has been said or done that was “improper”
Settlement agreements

• Compromise agreements to be renamed settlement agreements. Standard text to avoid cost to parties and Employment Rights Act will be amended so that existing and future claims can be compromised without having to list all potential causes of action
• Not going ahead with no fault dismissal i.e. dismissal in return for a redundancy payment but no procedure
• Confirmed by Vince Cable September 2012 – further consultation *Ending the Employment Relationship* with emphasis on settlement agreements
• Proposing statutory code to underpin use produced by ACAS – will include types of improper behaviour which should not be protected
• Template letters and model agreements will be produced
UPDATE

• Queen’s speech
  – *Enterprise, Employment and Regulatory Reform Bill* – reform of tribunals, ACAS pre-conciliation to all claims, mandatory period of ACAS conciliation before tribunal proceedings, introduction of legal officers. Renaming of compromise agreements. Power to limit UD compensation to a fixed sum or one year’s earnings whichever is the lowest. Penalty for employers who behave badly.
  – *Ending the employment relationship* – published September 2012 – more detail on settlement agreements and compensation levels
  – *Children and Families Bill* – revamp of parental provisions but no mention of flexibility
UPDATE

• Consultation on discrimination law reform
  – Third party harassment to go
  – Questionnaire procedure to go
  – Wider recommendation powers to go
  – Look at public sector equality duties
• Beecroft report
  – Introduce compensated no fault dismissal for employers with fewer than 10 employees
  – Scrap or delay parental leave reform and make flexibility non-statutory
  – TUPE suggests lobbying EU re harmonisation, redundancy pre TUPE, ETO reasons and scrap or change service provision
  – Redundancy change consultation periods
  – NOTE no fault will not be accepted and only redundancy has a chance of changing
September update

- 14th September 2012 Vince Cable announced measures to “streamline employment law” – NOTE is a reiteration of measures already mentioned above in the Enterprise and Regulatory Reform Reform Bill or other consultations
- A great deal of paperwork, very confusing and most of it saying very little that has not been mentioned before
- Emphasis on settlement agreements and changes to upper limit of compensation ie either 12 months’ pay or a fixed sum (whichever is the lower) – likely to be about £26,000
- The latter could have a significant impact on settlement agreements and alternative forms of dispute management as the parties would have a clear idea of their likely exposure (eg if the maximum is £26,000 would the parties wish to pay thousands in legal fees or would it be better to reach a settlement)
- As the median award is currently just over £4,000 this is not novel but the Government believes it will help manage expectations
- More detail on settlement agreements, new statutory code, model letters
Modern workplaces

• Flexible working
  – To be introduced for all employees. The existing statutory procedure will be replaced by a duty to consider requests “reasonably” and a statutory code of practice will be issued to give employers guidance on how to handle requests and demonstrate a reasonable process. Concerns re competing interests eg childcare, disability etc

• Equal pay
  – Government has proceeded with proposals to require tribunals to order an employer to conduct an equal pay audit where it has discriminated on grounds of sex in contractual or non-contractual pay. Obliged to order employer to conduct equal pay audit – failure = financial penalty
Modern workplaces

• Working time regulations 1998
  – Will be amended to allow four weeks’ statutory annual leave to be rescheduled and/or carried over into the next leave year when a worker falls ill during annual leave. For maternity, paternity, parental and adoption leave it will be 5.6 weeks of leave. Appears to be no limit to when this can happen.

• Parental leave changes
  – 18 weeks maternity leave for the sole use of the mother, maternity pay and allowance as now
  – Fathers would continue to receive two weeks’ paternity leave at flat rate in first 8 weeks
  – Remainder (34 weeks – 21 paid, 13 unpaid) to be shared between parents, taken when they choose, including together, in weeks or days depending on business need, to be reclassified as parental leave available to either parent on an equal basis (same for adopters or same-sex couples)
  – 21 weeks of pay reclassified as parental pay
  – Part of the period of flexible parental leave will be reserved for the exclusive use of each parent ie four weeks
  – This would be paid at the flat rate
Red tape challenge

- Budget announced three year moratorium on new regulations for small businesses (less than 10) and genuine new start ups but not paternity or default retirement age
- Also Red tape challenge, one in, one out – Consultation October 2011 on employment implications, ie compliance and enforcement, recruitment, managing staff and terminating employment
- Consultative documents on changes to TUPE, discrimination awards and consultation periods for redundancy
- However many of these not within the competence of the UK government – much said about discrimination compensation but in reality only a few high payouts
- May have more success with redundancy consultation periods particularly since the EU is currently reviewing the collective redundancy directive, the Acquired rights directive and the overall framework directive on information and consultation
Red tape challenge contd

- Consultative documents were issued on a review of TUPE and redundancy
- TUPE is regarded as too complex
- The document asks whether there should be a right to harmonise terms and conditions
- The redundancy consultative document asks questions about reviewing the consultation time periods for collective redundancies (the directive has no fixed timescales) and looking at the definition of an establishment
- To date no response on modern workplaces but a further consultation on the statutory rules on collective redundancies has been published and a response (very sparse) on TUPE
Redundancy consultation

- Call for evidence indicated that the consultation rules were not fit for purpose
- Opened consultation on statutory rules
- New proposals include reducing the minimum period before the first dismissal can take effect where 100 or more employees are involved
- Issuing a non-statutory code of practice dealing with areas of consultation
- Proposes reduction from 90 days consultation to either 30 or 45 days
- Minimum periods not required by Collective Redundancies Directive – does require that notification to the Government takes place at least 30 days before redundancies take effect
Redundancy questions

- What the reduction should be
- How to define establishment
- What to include in Code of Practice ie
  - When consultation should start
  - Who it should cover
  - Who should be consulted
  - What should be discussed
  - How the consultation should be conducted
  - When consultation can be considered to be complete
  - Conducting consultations in non-standard circumstances
  - How to engage effectively with Government
Response to consultation on TUPE

- **Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006** was published in September 2012
  - Says very little, identifies concerns of employers but is dismissive of them
  - Accepts freedom to manoeuvre limited by Acquired Rights Directive
  - Government will think what to do but may improve guidance rather than change law!!!!!!!!!!!!!!!!!!!
Concerns for business re TUPE

- The following concerns were identified (and minimised by Government)
  - Employee liability information should be provided earlier than 14 days;
  - No provision for post-transfer harmonisation of terms and conditions;
  - Gold-plating of the directive by including service provision changes;
  - Pensions are a concern – guidance would be welcome;
  - Insolvency is complex and confusing;
  - ETO reasons need attention – no satisfactory definition – guidance needed – especially “entailing changes to the workforce”
Health at work

- *Health at work – an independent review of sickness absence* notes the huge cost of absence to individuals, their employers and society at large
- It considers that many people signed off work could do some work
- The fit note has not been a major success as GPs are unwilling or unable to provide meaningful information on whether an individual could come back to work part-time, on reduced hours, to different work etc
- It proposes that after four weeks absence an individual be sent to an Independent Assessment Service to make a judgement on future action – it is not clear who will fund this nor who will run it – in other words it won’t be the GP who makes this decision
National Minimum wage

- From 1st October 2012 the minimum wage will be £6.19 per hour standard adult rate for workers aged 21 and over
- The rate for apprentices rises from £2.60 to £2.65 per hour
- The development rate for 18 to 20 year olds is frozen at £4.98 per hour and for those under 18 at £3.68 per hour
Tribunal statistics

- For the period from 1st April 2011 to 31st March 2012
- 186,000 claims – 15% fall on the previous year
- Highest Unfair dismissal award was £173,408 (no maximum for certain areas such as health and safety, whistleblowing etc – statutory cap currently £72,300 but being reviewed)
- Median award was £4,560
- More cases where costs were awarded but skewed by one case involving 800 claimants
- Median awards for discrimination varied according to the subject-matter but were between £4,000 and £13,000 (latter for sexual orientation).
- Disability around £9,000 and age around £6,000
Caselaw – contracts
Unilateral variation of contract

- **Blow and others v Boots**
- Whether Boots could reduce entitlement to double time for Sunday and bank holiday working
- Staff employed at different times had different entitlements and Boots wanted to harmonise, reduce cost of Sunday working and use money for other benefits
- Staff claimed unlawful deductions – whether contract allowed
- Contracts stated staff “will” receive double time
- Boots had discretion to withdraw or modify certain policies and procedures but nowhere to amend unilaterally the section on terms and conditions
- Held clear language is needed to reserve to one party the unusual right to unilaterally amend or withdraw a benefit
- It can be in an employee handbook
- Here there was no such right so the reduction was to a non-discretionary benefit and an unlawful deduction from wages
Casual contracts

- **Drake v Ipsos Mori UK Ltd**
- Drake worked for Ipsos Mori as a market researcher under a series of individual assignments for 5 years
- He was engaged on an assignment basis – there was no obligation on him to accept work and no obligation on the company to offer assignments
- He had no contractual documentation or terms and conditions
- However, a guide described him as a worker
- Company handbook stated that “once you accept the job, it is a verbal contract that you will complete it.”
- He was removed from the panel of interviewers – claimed UD arguing that each individual assignment was a contract of employment – employer succeeded in showing no mutuality
- EAT held sufficient mutuality for an employment relationship
- Engaged on a series of contracts – obliged personally to carry out work until completed
- Referred back to tribunal to consider actual employment status
Umbrella contracts

- **Pulse Healthcare v Carewatch Care**
- Carers employed by contractor under zero hours contract
- Contract passed to new contractor and individuals claimed right to transfer
- Preliminary point whether they were employees and had sufficient continuity
- Held contract given to carers did not reflect true position (see Autoclenz)
- In practice they performed services, were obliged to carry out the work offered and had to do it personally
- Argument that these were individual discrete contracts as opposed to global umbrella contracts did not stack up
- Contractor was providing critical care of a challenging kind which could not depend on an ad hoc arrangement
- Held global contracts and continuity
Caselaw dismissal
Over reaction!

- *Whitham v Club 24 t/a Ventura*
- Team leader. Company provided customer services for Skoda, part of Volkswagen and a significant customer. On site with both organisations
- After a bad day posted a comment on her Facebook – settings only open to 50 friends
- Comment related to working in a nursery but not with plants
- Dismissed – company policy held posting information about the job on the internet might led to disciplinary action – clean record to date
- Held unfair. No real investigation as to consequences of her comments. Volkswagen not mentioned, no confidential information on job mentioned, customer not asked and unlikely to terminate a large commercial contract on this basis
**Facebook**

- **Teggart v Tele Tech Ltd** – Mr Teggart on his home computer posted offensive comments about a female member of staff and other staff responded
- Someone made her aware of this and another person phoned the company
- Mr Teggart was dismissed for bullying and harassment and bringing the company into disrepute
- He claimed unfair dismissal arguing this was breach of human rights
- He said he had not intended to offend, it was done on his private computer
- Held facts clear – on claim of bringing company into disrepute company failed to properly investigate whether this was true as only one mention
- Bullying and harassment upheld, victim off work upset, violated her dignity and degrading working environment even though not addressed to her specifically
- No breach of human rights – once posted right to privacy is given up
- Right to manifest beliefs do not extend to comments about another person but are intended to refer to a philosophy, set of values guiding an individual’s conduct
- Freedom of expression includes a responsibility regarding the rights of others
Suspension as breach of contract

- **Crawford v Suffolk Mental Health Partnership NHS Trust** – two nurses suspended pending investigation into mishandling patient with dementia
- Employer referred matter to police but no charges
- Six month suspension
- Court of Appeal – held sometimes a long suspension may constitute breach of trust and confidence, can lead to stigma even if no discipline
- Held no real risk of behaviour being repeated if they stayed at work – astonished that referred to police
- **Suspension should not be automatic** – each case should be considered on its merits ie risk of repetition, impact on other staff, fair investigation
Caselaw discrimination
Equal pay - Same establishment or common terms

- **City of Edinburgh Council v Wilkinson**
- Administrative and clerical workers claiming equal pay with grave diggers and refuse collectors all working in different places
- The tribunal, EAT and Court of Session used different explanations to allow the comparison to proceed
- They all worked for the same employer but not at the same establishment i.e. physical building but the question was whether this could be regarded as the same establishment
- The ET held they were on common terms and conditions so establishment was not the issue
- The EAT held that they did work at the same establishment if an establishment was given a broad meaning
The wording of the legislation was “at” not “in” the same establishment which indicated a locality rather than a body or undertaking.

They did not therefore work at the same establishment.

However there were common terms and conditions as dictated by the Red Book.

A male comparator had he moved to another establishment would take his current terms and conditions with him (note the argument in Dumfries above that this is not necessarily true).

The Court of Session held that it all depended on the nature of the post and duties irrespective of location (eg it is highly unlikely that a grave digger can move his post to another location).
Disability
Reasonable adjustments

- Salford NHS Primary Care Trust v Smith: occupational therapist on long-term sick leave with chronic fatigue syndrome.
- Job ceased to exist – offered a number of different roles – all rejected.
- Offered administrative work and training in IT.
- Failed to attend meetings.
- Employer wrote inviting to further meeting and setting out options including termination.
- Resigned claimed CD and disability discrimination.
- ET – employer should have made a job for her even if not productive or proposed light duties.
- EAT disagreed – this was not a reasonable adjustment – which had to alleviate the particular disadvantage – employer had done all he could – need to pay attention to statutory test not a general test of reasonableness.
What is the test?

- In *Wilcox v Birmingham CAB Services Ltd* – the court considered the proper test for reasonable adjustments
- The individual did not want to work in different CAB offices but wanted to work from home as she had a disability – agoraphobia and travel anxiety
- Her employer did not know this, she refused to see a GP, she was obstructive in providing a medical report – held no failure
- In order for the duty of RA to apply the employer has to know (actually or constructively) both that the employee is disabled and that the employer’s practices put the disabled person at a disadvantage – only then does the duty arise
- Here the employer did not know and was not liable
Religion
Handling food

- **Chatewal v Wandsworth Borough Council** all staff who used the communal kitchen had to share in cleaning it and the fridge. Mr C objected as this might bring him into contact with meat which was forbidden by his faith. He argued the requirement was indirect race and religious discrimination. He had to demonstrate that he was part of a group affected compared to others not of that faith.

- The tribunal accepted that he is a member of the Guru Nanak Nishkam Sewak Jatha (GNNSJ) branch of Amritdhari Sikhs whose beliefs amount to a religious belief. Sikhism is a race and a religion.

- The requirement to clean out the fridge was a provision, criterion or practice (PCP).

- His claim failed as he could not show that there was a significant group of others of the same religion or belief as him who were disadvantaged. He was unable to show that Sikhs as a race were particularly disadvantaged by this PCP. EAT remitted back as tribunal failed to explain its reasoning as to why he was not part of a “group”
Age discrimination
Enforced compulsory retirement – note appeal to Supreme Court

- **Seldon v Clarkson, Wright & Jakes EAT** - EAT had to consider whether enforcing retirement of a partner in a law firm was age discrimination (normal exemption does not apply to partners)
- This has to be objectively justified otherwise it will be discriminatory
- ET held that 3 aims satisfied the defence ie
  - Retaining associates by ensuring the opportunity for partnership after a reasonable period
  - Ensuring effective workforce/succession planning by having a realistic long-term expectation as to when vacancies would arise
  - Fostering a congenial and supportive culture by limiting the need to expel partners due to poor performance
- The EAT agreed with the first two but held that the third had not been proved ie there was insufficient evidence of the latter ie that at 65 performance would deteriorate
Seldon continued

- Appeal to CA – lost – social policy in Heyday did not apply to private employers but to the state itself
- Appeal to Supreme Court – held to be direct discrimination which can be justified unlike other areas of discrimination law
- However the test of justification for direct discrimination is different to indirect
- Not enough for employer to show a business need – there has to be some overriding social policy – in this case impact on more junior members of staff and progression
- Referred back to tribunal to decide whether if this is justified – it is justified at 65 rather than any other age
- Will require statistical evidence to show benefit to others and why a specific age provides that
ECJ on compulsory retirement

- *Rosenbladt v Oellerking Gebäudereinigungsges mbH* – ECJ held that a compulsory retirement age of 65 in a contract of employment – whilst *prima facie* discriminatory on grounds of age – is justified if the following conditions are met
  - The contract has been collectively negotiated with a union
  - The employee will receive a pension (state or occupational) so they have a replacement income and
  - Compulsory retirement has been widespread in the country for a long time without having had any effect on the levels of employment
ECJ again

• The ECJ in *Fuchs v Land Hessen* has held that German law requiring state prosecutors to retire at 65 on a generous pension was justified.
• It appears to hold this on the basis that it would encourage the promotion of a younger workforce.
• It also appears to suggest that it can be legitimate to retire older workers to prevent possible disputes concerning employees’ fitness to work beyond a certain age.
• It is not clear how this will be applied in the UK given the abolition of a default retirement age.
And again

- **Prigge v Lufthansa** – whether a collective agreement providing for a retirement age of 60 for pilots was discriminatory and whether could be justified
- Held retirement age could be justified on grounds of physical attributes ie to stop human failure causing aeronautical accidents – public security and protection to health
- However applicable national and international law did this by providing for a retirement age of 65 therefore not necessary to limit to 60
- **So in general justified retirement age but 65 not 60**
And again

- **Hornfeldt v Posten Meddelande AB**
- ECJ – Swedish law provides an employer can terminate employee’s contract of employment on the sole ground that the employee has reached 67 regardless of any pension arrangements
- Note contrary to UK law which has no default retirement age
- Mr H reached 67 and was dismissed - worked part-time and did not have enough pension to live on – claimed age discrimination
- Was it justified ie by a legitimate aim and whether or not the means put in place to achieve the aim are appropriate and necessary
- **Swedish law states no aim but that is not fatal to the claim**
Hornfeldt

- Argued seeks to avoid termination in situations that are humiliating for workers by reason of advanced age;
- Enable pension regimes to be adjusted on basis of principle that income received over full career taken into account;
- Reduce obstacles for those who wish to work beyond 65;
- Adapt to demographic developments and anticipate risk of labour shortages;
- Establish a right, and not an obligation, to work until 67;
- Make it easier for young people to enter labour market.
- ECJ accepted that these were in principle legitimate aims
- It cannot be argued that the directive precludes a national measure that allows an employer to terminate on the sole grounds of age
Costly retirement

- **HM Land Registry v Benson and others**
  - the employers conducted a VR exercise. It had more applicants than budget so had to make a selection. It selected on the basis of who would be cheapest.
  - This allowed the maximum number of posts to go. A number of employees claimed age discrimination.
  - Not surprisingly the older employees cost more due to length of service but also to the higher cost of awarding an immediate unreduced pension, making them more expensive to dismiss.
  - The tribunal accepted that this was the only reasonable criterion but that it constituted indirect discrimination.
  - It held that this was not justified as being a proportionate means of achieving a legitimate aim. They could afford the extra £19.7 million
  - The EAT disagreed. The budget of £12 million was part of HMRL's legitimate aim so the question was whether the selection criterion was a proportionate means of achieving it. Given the Tribunal found that it was the only practicable criterion it was obliged to hold that it was proportionate.
Miscellaneous
Surrogacy

• Referral to ECJ on a sex discrimination claim from a woman who took over a child at birth from a surrogate mother
• Employer refused her maternity leave and pay (legitimate under UK law)
• No adoption leave or pay (might be later)
• Employer offered her holiday, career break etc but not maternity leave
• Claiming this amounts to sex discrimination
Caselaw TUPE and collective labour law
Organised grouping

• **Eddie Stobart Ltd v Mormon**. Depot with 35 staff and 5 clients. Lost 3. Work done for Vion transferred to FJG Logistics Ltd.
  • Whether any of the employees transferred.
  • ES said that those wholly employed or 50% employed on Vion work transferred.
  • FJG disagreed.
  • EAT held – necessary to consider whether there is an organised grouping of employees and then consider whether they are assigned to a particular client. Here employees organised according to shifts and could do a considerable amount of Vion work but they were not assigned to Vion work.
  • **Belong to ES – may be made redundant (site closed)**
Assignment of pub lease

- **LOM Management v Sweeney**
- Tenant ran MacConnell's bar in Glasgow under commercial lease from brewery
- Lease assigned to new tenant
- Claimant on holiday at time of change and on return had no job – had there been a TUPE transfer – ET held classic TUPE transfer
- EAT – did accept that TUPE can apply to the transfer of a lease (Daddy’s dance hall) – but also has to be transfer of a business which was intrinsically linked to the property and satisfied definition of economic entity (ie if premises became a shop for example would not)
- Had to be organised grouping of persons and assets facilitating exercise of economic entity which pursues a specific objective
- In other words the assignment of the lease of itself does not establish TUPE – ET failed to ask relevant questions so referred back
100% on one client

- **Seawell v Ceva** - Mr Moffat employed by Ceva which provided services for Seawell
- Seawell terminated arrangement and took services back in house
- Seawell was not the only client of Ceva and most employees did work for a variety of clients
- Mr Moffat worked 100% of his time on the Seawell contract
- ET held Mr Moffat could comprise an organised grouping of employees
- EAT disagreed – no group of employees specifically organised to do Seawell work. An organised grouping denotes a deliberate putting together of a group for the purpose of the relevant client work
- **Here no such grouping - happenstance**
Substantial change in working conditions

- TUPE 2006 introduced concept of substantial change in working conditions to the material detriment of the employee entitling the employee to terminate the contract and regard him or herself as dismissed.
- **Abellio London v Centrewest London Buses** – bus company lost a route to another company. Employees based at one depot required to move to another depot.
- Held substantial change to their detriment – unfair.
- Also constructive dismissal – *unclear what alternative is for employer*
Harmonisation

- In *Manchester College v Hazel* – Manchester College successfully bid for Offender Learning contracts and the claimants TUPE transferred to the college.
- There were hidden costs which had not come to light under due diligence.
- The college began a process of costs savings – including a request for 300 voluntary redundancies.
- It decided to save further costs by harmonising terms and conditions across 37 different contracts of employment and asked the claimants to take wage reductions.
- When they objected they were dismissed and re-engaged on inferior contracts which they accepted and claimed unfair dismissal.
- Dismissal was held to be connected with the transfer and not an ETO reason entailing changes in the workforce.
- The redundancies were irrelevant to this question – it is the reason for the dismissal of a particular employee that must entail changes in the workforce either numbers or functions.
- The remedy was re-engagement on new contracts at the old rate of pay.
Dismissal of employees when company in administration

- An unusual decision on the facts – *Spaceright Europe Limited v Baillavoine* – company entered into administration. All staff dismissed – no buyer.
- Eventually sold the business as a going concern.
- Mr B argued that his dismissal was automatically unfair as being for a reason connected with the transfer.
- Spaceright argued that it was not connected with the transfer as at the time of dismissal there was only the possibility of the transfer (see *Spence and Litster* earlier cases on the same theme – Spence dismissal fair as at the time of the transfer no employees and at the time of dismissal no transfer, Litster employees dismissed to make way for transfer so connected to and would have been employed had they not already been unfairly dismissed)
- Held – even though no prospective transferee had been identified at the time of the transfer, it was enough that dismissal had taken place in order to achieve a transfer at some future date - ????????
Administration and bankruptcy

• **Key2Law (Surrey) LLP v De’Antiquis**
  - Court of Appeal – holds administration proceedings can never be said to be instituted with a view to liquidation of assets of insolvent business (might end up that way but not the point of administration)
  - Consequently when administration under TUPE occurs reg 8(7) of TUPE will **NOT** apply and liabilities pass to the purchaser of the business
  - Reg 8(7) provides that parts of directive do not apply ie transfer of contracts of employment when there is bankruptcy proceedings or analogous insolvency with a view to liquidation of assets
  - **In other words administration passes contracts, bankruptcy and insolvency does not**
  - In this case employee was assistant solicitor – administrators appointed for her firm – held to be a TUPE transfer with her contract passing to the new employer
Redundancy
Appeal to ECJ at last

• In *USA v Nolan* the Court of Appeal has referred a point of general importance to the ECJ
• It asks when exactly does the employer’s obligation to consult arise in collective redundancies
• Does it arise before or after a strategic or commercial decision that will lead to redundancies?
• In Nolan a US army based closed and a court held that there was a failure to collectively consult
• Despite much caselaw, it is not clear at what point the obligation actually arises – eg UK law talks of “proposing to make redundant”, EU law talks of “contemplating”
• The CA asks whether consultation arises when the employer is proposing but has not yet made a strategic decision or only when the decision is actually made
• The AG decision does not take us much further forward holding that the duty arises when “a strategic or commercial decision which compels the employer to contemplate or to plan for collective redundancies is made by a body or entity which controls the employer”!!!
Woolworths

- **USDAW v WW Realisation 1 Limited (in liquidation) and others** – Woolworths was liable for failure to consult adequately when it closed its stores. There were no special circumstances such as financial position nor going into administration.
- The tribunal regarded each store as a separate establishment thus employees in stores with fewer than 20 people had no right to a protective award.
- Questions re definition of establishment/see Red tape consultation/EU law.
- Protective award reduced to 60 days as some consultation.
Best person for the job

- **Samsung Electronics v Monte D’Cruz**
- Reorganised print division. Informed three heads of department that their roles would be abolished and merged into a single position
- Mr D’Cruz unsuccessful and also for junior role
- Job went to external candidate
- Argued criteria were subjective – argued this was not allowed in redundancy SAEs
- Held – tribunal expected to consider how far interview process was objective – some subjectivity inevitable – an employer’s assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgement
Subjective criteria

• *Mitchells of Lancaster (Brewers) Ltd v Tattersall*
  • Claimant one of five members of senior management team unfairly dismissed after flawed selection but with 20% Polkey reduction
  • Respondent appealed – EAT upheld UD but disagreed with tribunal’s criticism of selection criteria
  • Held just because subjective criteria are matters of judgement, it does not mean that they cannot be assessed in an objective way
  • *Concept of criteria only being valid if capable of scoring or assessing is worrying – it is box-ticking*
  • Polkey reduction therefore too small – greater likelihood of criteria being valid
Redundancy scoring

- **Nicholls v Rockwell Automation Ltd**
- Followed Mitchells case
- Claimant dismissed following redundancy scoring exercise
- Genuine redundancy and fair process applied – dismissal held to be unfair as certain scores lower than they should have been (according to the ET)
- EAT held dismissal was fair
- Argued that ET had engaged in a detailed critique of certain items of scoring in determining whether dismissal was reasonable – had substituted own views
- Using criteria not capable of objective verification not fatal to redundancy selection
SAE – to whom?

- **Readman v Devon Primary Care Trust** – Mrs R was a nurse who was to be made redundant
- She was offered three alternative positions, one as a Hospital Matron was regarded as SAE by the tribunal
- She refused the work arguing that she wanted to stay in community nursing and was denied a redundancy payment
- Held the test is whether the work is suitable and whether refusal is reasonable, the latter is subjective ie whether the employee in question acted reasonably in refusing the offer
- **Wanting to stay in community nursing was a sound and justifiable reason for turning down the offer so she was entitled to a redundancy payment**
Pool of one

- *Capita Hartshead Ltd v Byard* – claimant was an actuary
- Work diminished and was insufficient for a full-time role
- She was put in a pool of one even though there were other actuaries
- The employer argued that actuarial work involves a personal relationship with clients who would not like being moved to a different actuary
- Held unfair dismissal – wrong pool – risk of losing clients was minimal and other people doing the same work
And again

- In *Wrexham Golf Co Ltd v Ingham* Mr Ingham was a steward at the golf club and one of 11 employees.
- The board took the decision that cost savings were needed and decided the role of steward was not needed and made Mr Ingham redundant.
- He argued at tribunal that the decision was not within the band of reasonable responses as no others were considered for the pool eg bar or catering staff.
- ET held substantial overlap in work so a larger pool should have been considered.
- **EAT – remitted back to the tribunal**
- There will be cases where it is reasonable to focus on a single employee without developing a pool or considering one.
- Note previous case of Capita – had the employer “genuinely applied” its mind to the issue of who should be in the pool – if so they might conclude that a pool of one is appropriate.
Reduction in head count not needed

- **Packman v Fauchon**
  - Book-keeper – downturn in business, new software – reduced number of hours needed to carry out the work
  - Sought to persuade her to cut her hours – refused – dismissal - ?

Redundancy
- Tribunal held diminishing need for book-keeper so redundancy
- Previous conflicting caselaw required a reduction in headcount
- EAT – no such reduction required – if amount of work available for same number of employees is reduced then dismissal is by reason of redundancy
Working time holidays
Entitlement to carry over

- **Adams and another v Harwich International Port Ltd**
  - Two employees had prolonged periods of sickness absence and had not asked for nor taken any holidays during their sickness
  - Later asked to take accrued leave but employer refused
  - Held both were entitled to carry over holidays to the immediately following year
  - However the tribunal held that this right should not be open ended and capable of being carried over from year to year indefinitely otherwise it did not meet the objectives of the directive
More of the same

- *Fraser v St George’s NHS Trust*
- On sick leave for four years until dismissal
- Last two years received no pay
- Sought four weeks holiday pay for each of the two years (according to Stringer and the above cases this is correct)
- EAT held that the claim should fail
- An employee is only entitled to holiday pay if she has actually taken the leave to which the pay relates and has done so by giving notice as required by the regulations
- Believed that this was not inconsistent with *Pereda*
But conflict

- **NHS Leeds v Larner**, the employee was absent for the whole of a holiday year and had not taken or arranged to take any holidays.
- She was dismissed on the grounds of capability but was not given any payment for untaken holidays.
- The employer argued that her right to holidays expired at the end of the holiday year i.e. “use them or lose them”.
- The EAT disagreed. She was unable to take her holidays due to sickness and was entitled to take them at a later date. As she was dismissed this meant in monetary form.
- There was no requirement on an employee to request holidays. It would be different had the employee been at work and had failed to request or use the holidays.
- Fraser and Larner conflict resolved by Court of Appeal
- No requirement of prior leave request therefore entitled to pay in lieu for all leave untaken
ECJ – time limit to carry over

- **KHS AG v Winfried Schulte** – under German law there is a time limit to the carry over of untaken holidays due to sickness of 15 months after the holiday year in which it was due
- Referral to the ECJ to ask whether this is consistent with the directive
- The ECJ stated that this did not breach the directive but appears to accept that a six month period might be insufficient
- Carry over must be substantially longer than the reference period to which the leave relates
- AG had held that 18 months was acceptable
- They acknowledge that it should not be indefinite as this is not compatible with the directive ie it ceases to have the positive effect of a rest period
- Must also take account of specific circumstances of worker who is unfit for several consecutive rest periods
More to come

• *Dominguez v Centre informatique due Centre Ouest Altantique, Prefect of the Centre Region – ECJ* - right to paid annual leave cannot be subject to a condition that worker worked a minimum period during reference period.
• National laws can apply a different period provided it is at least four weeks.
• For national government to decide rules re additional leave
• Just because national laws are different does not mean they are disapplied.
• Will be relevant to whether EU decisions apply to 4 weeks or 5.6 weeks
• *Decided direct effect on public sector employees*
And more

• *Neidel v Stadt Frankfurt am Main* – asks ECJ to advise whether the directive covers entitlements to annual leave where national law provides for more than four weeks and whether payment in lieu on termination applies only to the four weeks or any longer period.
• Answer no need to carry over more than the directive’s four weeks. Also possible to have a set period of carry over as long as not too short in relation to reference period in which it is granted eg one year.
• But (consistent with CA in Larner) no requirement of prior leave request but limited to leave in directive
• *Alvarez v Consejería de la Presidencia, Justicia e Igualdad del Principado de Asturias* - whether temporary incapacity arising during annual leave only entitles the worker to leave at a later date in the incapacity involves hospitalisation
Falling sick during annual leave

- **ANGED v FASGA** – whether a worker who is sick during annual leave can take the leave at a later date – reference to ECJ from Spain
- Held entitlement to paid leave important principle of European law
- Contrary to purpose of directive to grant a right only if the worker was already unfit at the start of leave
- National provisions cannot preclude the taking of leave at a later date if the worker falls sick during leave