

Employment Brief

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Welcome

Background

Over the past 18 months many employers have been forced to look at redundancies. However, redundancies are often the last resort for any employer. Many employers have considered more creative alternative cost saving ideas such as pay cuts, introducing longer hours, amending generous sick pay policies, reducing working hours (with a consequent reduction in pay) or sending employees on unpaid sabbaticals.

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Unilateral Changes to Terms and Conditions - Can Employers Implement These Without Fear of Claims?

However, varying terms and conditions (especially in relation to pay) can be difficult and time consuming. Employees are often reluctant to consent to such changes which can leave employers little choice but to adopt a process of dismissal and re-engagement on the new terms.

Dismissal and Re-engagement

Dismissal and re-engagement is a cumbersome and time consuming process. Where employers are proposing to carry out this process with more than 99 employees, it must collectively consult for a period of 90 days before the first dismissal takes effect. Where an organisation does not have a recognised trade union, further time will be taken up as the employer will also be required to elect staff representatives to consult with. Further, once the 90 day period has elapsed, any employee who has not consented to the variation will be dismissed with notice. Notice period can often be up to 3 months subject to an employee's length of service). If the employee does not sign the new contract before the expiry of their notice period then they

that Asda:

'reserved the right to review, revise, amend or replace the contents of this handbook, and introduce new policies from time to time reflecting the changing needs of the business...'

Asda sought to rely on this clause to change the pay regime. The employees claimed unlawful deduction of wages claiming they had never consented to the change in the pay structure.

The EAT found that Asda was entitled to reserve the right to change terms and conditions. As the clause Asda relied on to vary the terms and conditions was clear and unambiguous, and the objective for the variation was in accordance with its business needs i.e. to have one pay structure for all employees, such a variation was permitted.

What does this mean for employers?

It was previously thought that a unilateral change in core terms and conditions such as

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will be treated as dismissed. This can leave the employer open to claims of unfair dismissal.

Unilateral variations

However, following the case of **Bateman and Ors v Asda Stores Ltd** there is now an alternative option for employers. In this case, the Employment Appeal Tribunal (EAT) held that the employer had contractually reserved the right to vary employment contracts unilaterally without an employee's express consent; this could extend to clauses such as working hours and pay.

In this case Asda's staff handbook was expressly incorporated into the employees' contracts of employment. The employees at Asda were on different pay structures, referred to in the handbook. Asda wanted to harmonise the terms so a single pay structure applied to all employees. There was a clause in the handbook which stated

pay, would either be considered as a breach of contract or a breach of the implied term of trust and confidence. However, the Asda case is an authority for the view that if an employer has a clear and unambiguous contractual right to vary terms and conditions it may do so without the consent of the employees.

However, employers should still be mindful in the manner in which it imposes the changes. If the changes are unreasonable, arbitrary or capricious, or where the employer fails to give any notice of the changes, or fails to consult on the change, it will be in danger of breaching the implied term of trust and confidence which would give rise to a constructive unfair dismissal claim. In this case, Asda consulted with the employees for several months on the proposed changes which is why the EAT found that it had not breached the implied term of trust and confidence.

TUPE: Change of Service Provider

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE 2006") widened the scope of TUPE to cover a 'service provision change'. Two new cases at the Employment Appeals Tribunal ("EAT") have clarified the extent to which TUPE applies to a service provision change. In this article we review these cases and analyse the ramifications of this.

Background

A service provision change occurs when there is an initial (or first generation) outsourcing, a subsequent (or second generation) outsourcing or an in-sourcing i.e. where services are moved back in-house. However, the supply of goods and "one-off buying-in of services" are excluded.

In order for TUPE to apply, there must be an organised grouping of employees (which can extend to one employee) whose principal purpose is to provide that service on behalf of the contracting party.

transfer the employees on) will be left employing the staff, which could mean redundancies.

Churchill

Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and others

(June 2009) concerned the provision of temporary accommodation for asylum seekers. The new provider supplied a different number of beds at accommodation in a different location from the old. Because the asylum seekers were only resident for very short periods of time, none of them moved to the new site on transfer. The new provider claimed that the services provided were not sufficiently similar for TUPE to apply.

The EAT took a broad approach, stating that the service provided was for the provision of accommodation to asylum seekers and that it was not tied to a location or to specific individuals. They held that TUPE applied notwithstanding minor changes in the services provided before and after a transfer so long as they are

"If TUPE does not bite then the original employer (who would usually be expecting to transfer the employees on) will be left employing the staff, which could mean redundancies."

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There is no need for a transfer of assets or employees for TUPE to apply to a service provision change (as there would be for a business transfer) as there is no specific requirement in TUPE 2006 for the identity of the services to be retained after the transfer. TUPE will therefore apply more often in these cases than for business transfers. However, TUPE 2006 does say that the same service still needs to be provided.

The question therefore is 'what is the same service'? Where contracts for the provision of services are changing hands, how similar does the new activity have to be to the old one for TUPE to apply? The question is an important one as whether TUPE bites or not will dictate who becomes responsible for the employees following a change of service provider. If TUPE applies then the new employer will take over responsibility for them. If TUPE does not bite then the original employer (who would usually be expecting to

'fundamentally or essentially the same'. It should be noted however that the contracts for each provider in this case were identical apart from the location and number of beds. Whilst the case confirms that some variation is permissible it does not indicate to what degree.

OCS Group

OCS Group UK Ltd v Jones & Ciliza (August 2009) concerned the provision of catering services. The outgoing provider was contracted to provide both hot and cold meals, with the staff spending a substantial amount of time in preparing the hot ones. The incoming provider, MIS, was contracted for a much reduced service providing only pre-prepared sandwiches and salads.

The EAT applied the 'fundamentally or essentially the same' test from *Churchill* but found that the two services in this case were not sufficiently similar for TUPE to apply. In particular the EAT upheld the tribunal's decision that the sandwich

and salad bar provided by the incoming contractor was a “wholly different operation” to the full catering service operated by the outgoing contractor and rejected a suggestion that the post-transfer activities were sufficiently similar to the pre-transfer activities as both related to the provision of food. Whilst both contracts were for the provision of catering services, the difference in the details of services to be provided and the manner of their provision led the EAT to conclude that MIS was providing a ‘wholly different operation’ to OCS.

The test and its application

The ‘fundamentally or essentially the same’ test from **Churchill** will apply. The test is a pragmatic one however and a tribunal will look at the whole situation in deciding if TUPE applies to a given service provision change.

It may be assumed that tribunals will try to adopt a broad approach and overlook minor differences as far as possible in order to preserve the spirit

clean break with minimum costs.

2. Transfer between third party contractors

When taking on a new contract for the supply of services remember the following:

- a) Look at the services provided by your predecessor as against the services you are being contracted to provide. If they are sufficiently different then TUPE will not bite and you will not have to take on responsibility for your predecessor’s employees. Take advice if necessary and do not take on employees you do not have to, particularly if you envisage making redundancies or changes to contracts of employment.
- b) Think of what will happen at the end of the contract. When the service is put out to tender again at the end of your contract, the new contract may be for services that are sufficiently different from those you are providing to cause TUPE not to bite. In this case you will be left with the cost of making redundancies. You may wish

“If you deliberately structure a transfer back in-house so as to avoid TUPE then the employees affected may have a claim against you.”

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of TUPE and protect employees’ positions. That said, there will be situations like **OCS Group** where, although the contracts may fall under the same umbrella, the differences in the details of the services contracted for are such that they cannot be regarded as fundamentally the same and TUPE will not apply.

Parties involved in tendering for contracts for the provision of services would do well to factor this into their actions when tendering or bidding for contracts for services. In light of this, we would therefore recommend the following approach:

1. Outsourcing

When undertaking a first generation contracting out, remember that you are in control of what those services are. Ensure that the tender is for services that are sufficiently similar to those undertaken in-house. This will ensure that TUPE will bite so that responsibility for any employees will transfer to the new contractor, ensuring a

to factor this risk into your costs or request an indemnity be inserted into the contract at the outset for any redundancy costs you may incur on termination.

3. Bringing services in-house again

The situation in paragraph 2 a) above may apply again but it is unlikely to. Remember that where transfers are structured so as to deliberately avoid TUPE, tribunals may apply it anyway to protect the employees’ rights. If you deliberately structure a transfer back in-house so as to avoid TUPE then the employees affected may have a claim against you. Where the change is for a genuine business reason, the burden of proof will be on you as the employer (and the person with control over the structure of the transfer) to prove it and either the affected employees or the outgoing contractor may bring a claim expecting you to do so. You should factor in the risk of defending potential claims into your decision.

Retiring at 65 - Changes Afoot?

The Employment Equality (Age) Regulations 2006 have provided employers with a defence to age discrimination and unfair dismissal claims where an employee is retired at age 65 or the employer's normal retiring age and the prescribed procedure has been followed. However, in the current economic climate financial necessity has meant more and more older employees are wanting to work beyond 65 because their savings and pensions have fallen in value. Following the European Court of Justice's decision in the *Heyday* case, there was uncertainty as to whether employers could still retire employees just for turning 65. The High Court has now ruled on this issue.

The ECJ's decision in *Heyday* that compulsory retirement ages may be justified. The case then went back to the UK High Court to allow the Government to satisfy it that the UK's retirement age of 65, being the UK's Default Retirement Age under the Regulations (DRA) was objectively and reasonably justified for 'public interest' aims.

Employers were obviously hoping that the High Court would uphold the UK's retirement rules

opposed to an older age) was not proportionate.

Given the tenor of the High Court's judgment it is highly likely that the Government will change the DRA provisions following the 2010 review, either to increase the DRA age or to abolish the DRA provision altogether. If it does not do so then it is likely that any future challenge to the DRA would be successful. The High Court refers to the age of 68 as an example of an older DRA age, in part because it is intended that pensionable age will rise to 68, and this (and the reasons for it) may be persuasive.

Initial indications on behalf of *Heyday* indicate that the High Court's decision will not be appealed but rather the focus will be turned to MPs to use the Equality Bill, currently progressing through Parliament, to abolish the DRA altogether in advance of any formal review and before the next election.

Whilst the DRA remains at 65, employers are entitled to dismiss employees on grounds of age provided they follow the required procedure. Subject to pressure put on the Government by *Heyday* and other bodies, if the 2010 Government

"Employers should be wary of stereotypes that people aged over 65 cannot perform well in their roles."

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and in a judgment handed down in September 2009 the High Court did find that the DRA provisions pursued legitimate social policy objectives concerning the labour market and were proportionate given the context of the time at which they were introduced. At least for now therefore, the status quo will remain and employers will continue to be able to retire people upon reaching the DRA and provided the correct procedure is followed, that dismissal will be lawful.

However the High Court indicated that it heard compelling and powerful arguments as to why the DRA should not be set as low as 65. The Government had always said that it would review the DRA of 65 in 2011 but after the ECJ's *Heyday* decision it brought this review forward to 2010 to 'reflect the change in economic circumstances'. This move had a significant bearing on the High Court's decision – had the review of the DRA not been imminent then the High Court said that it would have concluded that a DRA of 65 (as

review does lead to changes then these would likely not take effect until 2011 giving employers some time to prepare.

Notwithstanding any change, employers would still be able to dismiss at 65 but that dismissal would need to be objectively justifiable on its individual circumstances. Employers should be wary of stereotypes that people aged over 65 cannot perform well in their roles; a review referred to in the High Court indicated that collated evidence suggested, except in a very limited range of jobs, that work performance does not deteriorate with age at least up to age 70 (and there was virtually no evidence of what happened to work performance after 70 because so few people remained employed beyond that age). If the performance of an older employee is a concern, then performance monitoring and regular 1:1s (where any performance concerns are addressed) will be critical in providing a potentially fair (non-age-related) reason for dismissal.

Update – Recent Legislative Changes

A number of changes to employment law have recently come into effect with more changes coming in in April 2010.

- **The Work and Families (Increase of Maximum Amount) Order 2009 SI 2009/1903** has raised maximum week pay for purpose of calculating certain statutory payments, such as redundancy and basic awards for unfair dismissal, to £380.00 as of 1 October 2009. This will now remain unchanged until February 2011
- **National Minimum Wage Regulations 1999 (Amendment) Regulations 2009** raised the level of National Minimum Wage (NMW) with effect from 1 October 2009 from:
 - £5.73 to £5.80 for 22 and over
 - £4.77 to £4.83 for 18 – 21 year olds
 - £3.53 to £3.57 for 16 – 17 year olds

The Regulations also provide that service charges, tips and gratuities can no longer be used to top up wages.

Independent Safeguarding Authority (ISA) has been operational since 12 October 2009, maintaining the first centralised vetting system for those working with children and vulnerable adults. ISA will decide who should be barred from working with children and vulnerable adults. It has introduced a duty on employers to refer information to ISA when employment terminates (or could have terminated) because of harm or potential harm to a child or vulnerable adult, or there has been a relevant caution or conviction

- **The Supreme Court** – The House of Lords has been replaced by the Supreme Court as the highest appeal court in the UK. The reform means that the judicial function of the House of Lords has been separated from its parliamentary function
- **Points-based immigration** – From 5 October 2009, phase 3 of Tier 4 of the points-based immigration system was launched by the UK Border Agency. Tier 4 is the route for overseas students to study at UK educational institutions.

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Devonshires has taken all reasonable precautions to ensure that information contained in this document is materially accurate however this document is not intended to be legally comprehensive and therefore no action should be taken on matters covered in this document without taking full legal advice.

- **Proposal to scrap tax relief on childcare vouchers** – Gordon Brown has announced that from April 2011, employees who want to join an employer-supported voucher scheme will not get the current tax exemptions and from April 2015, voucher exemptions will be withdrawn completely. It is proposed that the savings from scrapping tax relief on childcare vouchers will be used to provide free childcare for children from low or modest income families
- **Vento guidelines should increase with inflation** – The EAT has handed down a judgement confirming that the Vento guidelines on compensation for injury to feelings in discrimination cases should be increased in line with inflation. The new figures are:
 - lower band: £6,000 (formerly £5,000)
 - middle band: £18,000 (formerly £15,000)
 - higher band: £30,000 (formerly £25,000)
- **Centralised vetting system for working with children and vulnerable adults** – The new
- **Additional paternity leave** - Consultation on the draft regulations has ended and the government has placed 6 draft sets of regulations before Parliament. The regulations came into force on 6 April 2010 and will grant additional rights to fathers/partners of mothers or partners of those adopting children born or adopted after 3 April 2011 where the principal carer has not used up their full entitlement to maternity/adoption leave and pay
- **Apprenticeship, Skills, Children and Learning Act 2009** - The new right to request time off for study or training came into force on 6 April 2010 for businesses with 250 or more employees and will be extended to all businesses from 6 April 2011
- **New 'Fit Note'** – The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) Amendment Regulations 2010 have introduced a change to the format of the traditional Sick Note. The new notes are to start being used by GP's from 6 April 2010. Doctors are to be given the additional option to confirm whether employees might be fit for some work.