TUPE – Right to Object to Transfer Ineffective

This case serves as a sharp reminder that the parties involved in a TUPE transfer cannot by agreement override the automatic operation of law which serves to transfer an employee’s employment to the new employer. In Capita Health Solutions v McLean the claimant was an occupational health nurse working for the BBC. The BBC announced that part of their HR department (in which Mrs McLean worked) would transfer to Capita. Mrs McLean raised a grievance citing her concerns that there would be a significant change to her role and her pension conditions would not be as favourable. Her grievance was rejected and she resigned for the reasons stated in her grievance whilst agreeing to carry out a 6 week handover secondment to Capita. Her employment therefore continued after the date of transfer to Capita. The EAT held that Mrs McLean was not allowed to exercise her right to object under Regulation 5(5) of the TUPE Regulations (which would have preserved her right to claim constructive dismissal) since her secondment for Capita produced the result that her employment transferred, even though there had been an agreement to the contrary. Regulation 5(5) is clear that to preserve the right to object, an employee must terminate his employment ‘without notice if a substantial change is made in his working conditions to his detriment’.

Delay in Following Statutory Dismissal Procedure Renders Dismissal Automatically Unfair

In Yorkshire Housing v Swanson the EAT held that an employer who had delayed for five months between holding the disciplinary meeting and dismissing Mrs Swanson had automatically unfairly dismissed her. Mrs Swanson had been employed for 13 years as a local government officer. In the course of a friendship with Mr Azam she introduced him to the company when he sought the tenancy of a property belonging to it. She also assisted him in completing forms which claimed he was in receipt of social security benefit. She was suspended on suspicion of assisting Mr Azam to obtain a tenancy when she must have known he was not in receipt of state benefits. A disciplinary meeting was held on 17 February 2005 and some 5 months later on 14 July Mrs Swanson was dismissed for gross misconduct. The EAT highlighted that the Dispute Resolution Regulations 2004 contain a general requirement that each step and action must be taken without unreasonable delay. The EAT accepted that an employer might in some cases be
able to argue that it was ‘not practicable’ to comply but this was not the case here. It stated that ‘delay is always the enemy of fair dispute resolution’. With this in mind, employers should ensure that their disciplinary procedures are followed without unreasonable delay. This general requirement is unlikely to be affected when the statutory disciplinary and grievance procedures are scrapped in April 2009 since this is a fundamental requirement to ensure fairness.

Tribunal Claim Form must relate to Grievance

The Court of Session agreed with the EAT in Cannop & others v The Highland Council that there must be essential correlation between an employee’s grievance and the claim form in equal pay cases. The issue before the EAT had been whether the tribunal erred in concluding that it was sufficient that the grievance ‘related’ to the subsequent claim and in not addressing the issue as to whether the relationship between claim and grievance was sufficiently close. The EAT overturned the tribunal’s decision, stating that on the tribunal’s reasoning, it would be enough at grievance stage for an employee to state that she had a complaint about equal pay, an approach which was not supported by the authorities. The employer would not be able to understand the nature of the grievance prior to the start of proceedings. The Court of Session upheld the EAT’s decision stating that the Dispute Regulations were there to encourage the resolution of employee grievances by requiring a stepped procedure before a complaint was presented to tribunal. Whilst an unduly technical approach is inappropriate and the grievance document and tribunal form are designed to perform different functions, the claim presented to tribunal must essentially be the same grievance as was earlier communicated.

Whilst this decision relates to equal pay claims, it is sensible for employees to follow the same approach with all grievances. Grievances should be properly particularised (see Clyde Valley v McAuley [Briefing 6]) and any subsequent claim should in essence be the same as that set out in the grievance.

Disability Discrimination – Clark v Novacold overturned

The House of Lords, in London Borough of Lewisham v Malcolm, has considered the meaning of s.3 of the Disability Discrimination Act, finding that liability for discrimination can only take place when the alleged discriminator knows the individual is disabled. It also found that ‘a reason which relates to the disabled person’s disability’ must be construed narrowly and the correct comparator is someone to whom the underlying reason still applies.

The case concerned the subletting of a council flat by Mr Malcolm who suffered from a recognised mental illness. His illness was not disabling when controlled by medication but at the time of the subletting (which was in contravention of Lewisham’s rules) he had stopped taking his drugs and his ability to carry out his normal day to day activities was
substantially impaired. The House of Lords stated its job was to ascertain the real reason for Lewisham’s claim for possession of the flat. It seemed inescapable that it acted to repossess because it was not prepared to allow tenancies to continue where the tenant was not living in the premises. The House accepted that, but for his mental illness, Mr Malcolm would probably not have sublet his flat and moved elsewhere but Lewisham’s reason for seeking possession was a pure housing management decision which had nothing to do with his mental disability.

The House also decided, not without misgiving, that the correct comparator in this case should be persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere. It further held that as a claim based on unlawful discrimination on ground of disability may be made the subject of civil proceedings, this pointed to a requirement of knowledge. In so deciding, the House found the Court of Appeal had erred in its finding in Clark v Novacold.

Equal Pay – No Comparison with Successor

In Walton Centre for Neurology v Bewley Mrs Bewley had attempted to compare her pay with that of male employees who had started employment after her. The EAT found that both under EU law and the Equal Pay Act it was not possible to use an employee’s successor as a comparator in an equal pay claim.

Restrictive Covenants – a Refresher

Two recent cases usefully rehearse the law on restrictive covenants and, whilst not breaking new ground, provide useful guidelines for the approach to be adopted when considering the enforceability of restrictive covenants.

In Norbrook Laboratories Limited v (1) Adair (2) Pfizer [2008] EWHC 978 Ms Adair was a sales manager for Norbrook. Her contract contained a non competition restriction for one year and a non solicitation of business restriction for one year. She left to join Pfizer and Norbrook sought to enforce the covenants. Ms Adair argued her salary was too low to justify such lengthy restrictions and the Court disagreed. It found that a non competition restriction for one year was not unreasonable given that Norbrook’s customers had committed to buy products for a period of one year. However, the scope of the business from which she would be precluded from work was too wide, being competing products with which she was ‘concerned’ during the last five years. This was too tenuous a connection and in any event most of the sales related information had a limited shelf life and so the restriction was too wide. The non solicitation of business restriction was upheld subject to blue pencilling the provision referring to customers which she had ‘direct access to’ (too unclear) and ‘prospective customers’ (too uncertain).

In WRN Limited v Ayris [2008] EWHC 1080 the High Court found that non solicitation and non dealing covenants were unreasonably wide because they included customers with whom Mr Ayris had never dealt. The case is useful for the Court’s reiteration on the applicability of covenants to employees whose roles...
and titles change over the years. The reasonableness of such covenants should be considered at the date of the agreement, not when employment terminates. This should remind employers to ensure covenants are periodically reviewed and kept up to date and when an employee’s job changes, the covenants may need to be replaced with new ones.

**Equalities Bill – The Reality!**

www.equalities.gov.uk/publications/FRAMEWORK%20FAIRER%20FUTURE.pdf

There has been much scaremongering in the press about Harriet Harman’s announcement that the proposed Equalities Bill will encourage positive discrimination (see http://news.bbc.co.uk/1/hi/uk_politics/7474801.stm). In fact the Government’s White Paper, Framework for a Fairer Future (published 26 June 2008), states simply that the Bill will allow employers to take under-representation into account when selecting between two equally qualified candidates.

The main aim of the Bill is to ‘declutter’ and simplify the existing legislation. There are presently nine major pieces of discrimination legislation, around 100 statutory instrument and more than 2,500 pages of guidance and statutory codes of practice. There will be a new single equality duty to replace the existing ones which will also cover gender reassignment, sexual orientation and religion or belief.

The Bill will also impose a new equality duty on the public sector and require transparency from them. It will contain powers to make further regulations outlawing unjustifiable age discrimination and strengthen enforcement (such as allowing tribunals to make general recommendations).

The Government will soon publish a detailed paper and the draft Bill.

**And Finally...**

**Review of No Win No Fee**

www.wired-gov.net/wg/wg-news-1.nsf/lfi/162562

The Ministry of Justice has announced a research of no win no fee arrangements in personal injury, employment and defamation cases. There are growing concerns that these arrangements may not always operate in the interests of justice.

**Time Off for Training**


The Department for Innovation, Universities and Skills has issued a consultation paper (to close on September 10) on the proposed new right to employees to request time off to train. It is planned that the new entitlement will apply to all employees who have worked for their employer for 26 weeks. The new right will closely follow the legal model of the existing right to request flexible working.
ICO Good Practice Note on TUPE Employee Information


The Information Commissioner’s Office has published new guidance to help employers when transferring employees under TUPE. It is often a minefield to comply with requests for information about employees and simultaneously observe the DPA. In brief, it is recommended that in the early stages of a transaction, names and other identifying information should be left out. When employee information under Regulation 11 of TUPE is to be provided both parties should take care to comply with data protection principles and the buyer must only use the information for the purposes of TUPE.

ECJ rules on 'disability discrimination by association'

The ECJ has ruled on associative discrimination in Coleman v Attridge Law, agreeing with the Advocate General that the Equal Treatment Directive is intended to protect not only those employees who are themselves disabled but those who are the primary carers for a disabled person, in this case Mrs Coleman’s young son.

In this case, Mrs Coleman worked as a legal secretary for Attridge Law. Her son, born in 2002, suffers from numerous health complications requiring specialised care. Mrs Coleman is his primary carer. In 2005 she accepted voluntary redundancy, then claimed unfair constructive dismissal and discrimination, alleging that her former employer;

- Refused to allow her to return to her existing job in circumstances where parents of non disabled children (‘other parents’) would have been allowed to take up their former posts
- Refused to allow her the same flexibility in working hours as other parents
- Described her as ‘lazy’ when she requested time off to care for her child whereas other parents were allowed time off
- Did not deal properly with her grievance
- Made abusive and insulting comments about her son
- Told her she would be dismissed if she arrived late again because of problems relating to her son’s condition when no such threat was made to other parents.

The ECJ considered whether the Equal Treatment Directive must be interpreted as prohibiting direct discrimination on grounds of disability only in respect of a disabled employee or whether the principle of equal treatment applied equally to an employee who is treated less favourably by reason of his child’s disability. It found that the Directive seeks to lay down, as regards employment and occupation, a general framework for combating discrimination and creating a level playing field. Those objectives would be undermined if an employee in Mrs Coleman’s situation could not rely on the prohibition of direct discrimination on the grounds of his child’s disability. For the same reason, the Directive must be interpreted as not being limited to the prohibition of harassment of people who are themselves disabled.
It should be noted that as Mrs Coleman’s claim was against a private not a public body her next step will be to show that the Disability Discrimination Act 1995 can be read purposively so as to comply with the spirit of the Equal Treatment Directive. Employers should be aware that the ramifications of this case will also extend to protections against associative discrimination on the grounds of age, sexual orientation, religion and belief.