Employment Round-Up

Legal Update
July 2013

Our monthly review of key cases and new law affecting employers

Abolishment of the "establishment" test for collective redundancy consultation

Decision: Collective redundancy consultation obligations will now be triggered when there are 20 or more redundancies in a 90-day period across the entire workforce, regardless of the location of the employees. The requirement that the redundancies must be at one "establishment" will no longer apply.

Impact: This is a significant change in the rules on collective redundancy consultation. Employers will need to keep a careful eye on the number of dismissals, which are not for capability or conduct reasons, across their entire workforce in order to avoid triggering a duty to consult. This may mean more careful planning across unconnected areas of the employer's businesses. This is likely to impact employers with large workforces or group companies with a single employing entity, as they are going to find the duty to consult is triggered much more frequently. A standing employee body for collective consultation purposes may be worth considering, to avoid frequent elections.

A Northern Ireland case has just referred the question of using the definition of "establishment" in collective consultation situations to the Court of Justice of the European Union. Depending on the outcome, this may override the decision made by the EAT in this case. We will update you when this decision comes out. We have also heard BIS is seeking leave to appeal the Woolworths decision due to it having "wide and unwelcome implications".

USDAW, Wilson and Ors v WW Realisation 1 Limited (in liquidation) (the Woolworths case)

TUPE does not apply where employee works exclusively for one client but was not an organised grouping

Decision: A single employee who spent 100% of his working time on one client was not an "organised grouping of employees" for the purposes of the TUPE service provision change test and so did not transfer when the client contract was lost. Although he spent 100% of his time on the client's business, other members of his team spent much less of their time on that client. The whole team must amount to an organised grouping with its principal purpose of carrying out activities for that client in order for them to be covered by TUPE.

Impact: Teams as a whole must be considered rather than focusing on individuals when considering the application of TUPE in these situations. If employers want to minimise the cost of future contract losses, a whole team should be identified as working for the client and the entire team's principal purpose must be to carry out activities for that client in order to be caught by TUPE. The service provision change provision is due to be repealed as part of TUPE reforms in the coming months. There is likely to be a long lead in period for this change, so these authorities will continue to be relevant for some time.

Ceva Freight (UK) Limited v Seawell Limited

A "worker" who is not an "employee" is covered by TUPE

Decision: A "worker" who was not in business on his own account was found to be covered by TUPE. This means workers as well as employees would potentially transfer to the transferee along with employees and may have to be consulted with in respect of a TUPE transfer.

Impact: This is only an Employment Tribunal decision, so is not binding on future tribunals. However, it has received a fair amount of publicity (in part perhaps because it relates to the TV personality John McCririck), so other tribunals may follow suit. Any worker (including a consultant) who is not consulted with in advance of a TUPE transfer could potentially bring a claim. This could be costly for employers. It is unclear what other rights these individuals would have under TUPE since unfair dismissal protections are fundamentally employee only rights. It would be advisable in most cases to include any relevant workers in any TUPE consultation exercise as a precaution.

J McCririck v Channel 4 Television Corporation and IMG Media Ltd

Also in the news....

The press have reported a recent case indicating that employees may be considered disloyal by creating competitive LinkedIn Groups during employment with the intention to join a competing business. An injunction requiring the employees to hand over access to and management of the LinkedIn Groups to their ex-employer has apparently been granted. This is the first case on this issue and is significant in terms of social media and the protections for employers. There has been much debate previously on the ownership of LinkedIn Groups and LinkedIn contacts, given this is a potential risk area for employers, so this is a good result for employers.

Employment law changes

There are a number of changes coming in on 29 July 2013. Those relating to the Employment Tribunal Rules, including the introduction of fees, were mentioned in our June Legal Update. Further key changes to be aware of:

- A cap on the compensation element of unfair dismissal tribunal awards is now set at the lower of 12 months' pay or the existing cap of £74,200 (the new cap will apply where the effective date of termination is after 29 July 2013).
- Pre-termination negotiations between employee and employer will be inadmissible in normal unfair dismissal claims (provided they comply with the newly produced ACAS Statutory Code of Practice on settlement agreements) and Compromise Agreements are to be renamed "Settlement Agreements".

A change to the Whistleblowing legislation has recently come in: any disclosure made on or after 25 June 2013 will only be covered by the legislation if the worker reasonably believes that the disclosure is "in the public interest".

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this Update.

Nicholas Robertson
Partner, London
T: +44 20 3130 3919

Nicola Thomson
Senior Associate, London
T: +44 20 3130 3714

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