H.R. Confidential

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In This Issue

Do Share Deals Now Attract TUPE?

HR professionals involved in determining employees' rights in corporate transactions have traditionally had to distinguish between share deals and asset sales. In a share deal, there are no particular rules that affect employees' rights. Those rights are no greater and no less than they would have been had the transaction not taken place. All that has changed is that the shares of the employer are now in new hands. Asset purchases, on the other hand, typically trigger the application of "TUPE"—the Transfer of Undertakings (Protection of Employment) Regulations 2006. TUPE provides a host of employment rights for the affected employees—not least protection from dismissal and from detrimental changes to terms and conditions, as well as the right to have employee representatives who must then be informed and, in most cases, consulted, about the transfer. Yet, despite this well-established distinction between the HR ramifications of share deals and asset sales, a few months ago—in the case of *Millam v. The Print Factory* (2007)—the UK Court of Appeal rocked the legal and HR establishment by holding that TUPE applied in a case where a purchaser had acquired the shares of a UK company. So, what brought about this apparently radical departure in approach and what are the implications for HR professionals?

Despite the blazing headlines suggesting that TUPE now applies to every share sale, the details of the case reveal something rather different. The Court of Appeal was not ruling that TUPE applies to share transactions in general. Rather, the court found that where, following a share sale, the purchaser integrates the business of the target very closely with its own operations, it is possible to say that the target's business has actually been transferred to the purchaser. This is in spite of the fact that the target remains a distinct company in its own right. In other words, it is the subsequent reorganisation of the target's affairs and not the share transaction which can trigger the application of TUPE.

In this regard, it is worth bearing in mind some of the salient features of the *Millam* case—which led to a finding that a TUPE transfer had occurred:

- The seller told its employees it was looking for a buyer that would integrate the target's operations into its own and the purchaser met this requirement.
- The employees were given conflicting messages as to whether TUPE applied or not; in one communication they were told expressly that it did apply.
- The purchaser operated the payroll for the target and managed its contributory pension system.
- The sales representative of the target moved over to the purchaser and the purchaser handled the target's sales function.
- 50% of the target's business was carried on by the purchaser.
- A significant element of the target's management was handled by the purchaser: it made the key management decisions, including changes to contracts and the decision to put the target into administration.
- Several newsletters issued to staff stated that the purchaser was to take over day-to-day management of the target.

So, what is the lesson for HR professionals going forward? The key is not only to be aware of whether any particular transaction is a share sale or an asset purchase—although that is, of course, important—but also to go one step further and ascertain what the purchaser's plans are for the target business,

even following a share sale. If there is going to be a close integration of the target into the purchaser's operations, with the purchaser taking over the management of the target and some of its key functions, there is a clear risk that TUPE will apply and employees' rights will be enhanced.

By Henry Clinton-Davis

Part-Timers and Bank Holidays

Since 2000, employers have been required to ensure that part-time workers are not treated less favourably than full-time workers. One dilemma employers often face is the question of whether to grant part-timers only those bank holidays that fall on the days they would normally work, or whether they should be entitled to take a proportionate amount of the eight statutory days. The case of *McMenemy v. Capita Services Limited* (EAT 79/05) goes some way to answering this question.

In this case, McMenemy worked part-time in a company that operated seven days a week. He did not work on Mondays and thus missed out on most of the bank holidays, as the company's policy was that only those working on the day on which a bank holiday fell would benefit from the observance. McMenemy brought a claim under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the Regulations), alleging that the company's failure to allow him time off in lieu of such holidays constituted a detriment to him as a part-time employee compared with full-time employees who were scheduled to work on bank holidays and benefited from the company policy.

The Court held that McMenemy had been treated less favourably than other full-time members of staff, but found that the reason for the less favourable treatment was not solely because he worked part-time, but because he did not work on Mondays. The Court was persuaded that the less favourable treatment was justified by the fact that the employer ran a seven-day-a-week operation and the full-time employees chose which five days to work and did not receive bank holidays in lieu if they did not work those days. It was therefore concluded that this policy was designed to achieve overall fairness, as full-timers were treated exactly the same as part-timers.

It remains to be seen whether the same approach would be taken with a five-day-a-week business rather than one operating seven days a week, where full-time workers receive bank holidays and have no choice but to work from Monday to Friday. The pro-rata approach therefore still remains the only approach which ensures 100% compliance with the Regulations, whereby part-timers who do not receive time off for public holidays falling on their non-working days should be compensated by being granted a pro-rata entitlement of days off in lieu. However, this case does demonstrate that adopting a policy of awarding the days that fall on normal working days may not be a breach of the law, provided that the policy is adopted for a cogent reason and applies to the entire workforce.

By Carolyn Baines

Enhanced Redundancy Payments

The Employment Equality (Age) Regulations (the Regulations), which came into force on 1 October 2006, are designed to outlaw age discrimination. Nonetheless, the Regulations contain specific exceptions where age-based requirements will be justified. One such exception applies to enhanced redundancy payments—payments that are more generous than would be payable under the statutory redundancy scheme.

The statutory redundancy scheme applies a set formula under which employees receive a week's pay (currently capped at £310) multiplied by the number of completed years of service (capped at 20), multiplied by 0.5, 1 or 1.5, depending on the age of the employee. This scheme has been preserved by the Regulations, even though it is, in essence, based on age and length of service.

As statutory redundancy payments are low, many employers have developed policies which pay out under a more generous formula. One common approach is to pay all employees a lump sum of the same amount (inclusive of statutory redundancy pay). On its face, this approach seems fair, as the employer is not distinguishing between different age groups and is, in fact, openly treating all employees the same, regardless of age. However, by following this practice, employers expose themselves to potential indirect age discrimination claims.

Staff Handbook

WilmerHale has developed an "off-the-shelf" staff handbook, updated to reflect the raft of recent employment legislation and case law in the United Kingdom. The handbook provides HR professionals with the know-how and procedures to assist employers in maintaining compliance with the law. If you would like further details, contact:

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The reason for these potential claims is that the difference in the uplift between the statutory payment and anything over and above this statutory payment will be less for an older employee who has had longer service than for a younger employee who has been employed for a comparatively short time. Therefore, older employees could claim indirect discrimination based on their age.

There is a similar risk of age-based claims when employers apply a policy of paying employees a fixed amount per year of service. Here, it is the younger worker who could claim to be disadvantaged, since the likelihood is that younger employees will generally have fewer years of service with their employers than their older counterparts, and their redundancy payments would reflect this disparity.

The Regulations recognize that, despite these issues, employers do often pay more than statutory redundancy and therefore clearly set out what an employer is permitted to do in terms of making enhanced payments. In essence, any enhanced payment should be based on the statutory redundancy pay scheme, even though this uses age- and service-related criteria. Using this scheme as the basis, an employer can multiply the amounts used for each age band by more than one; and/or raise or remove the maximum amount of a week's pay. An employer can also calculate redundancy payments by using the statutory scheme or a permitted enhancement of the statutory scheme and multiplying the total amount by a figure of more than one.

Employers should take note that, if they choose to amend the statutory scheme, they must make the same adjustments to each of the three age bands. Employers who depart from these permitted enhancements and use their own method of calculating enhanced redundancy payments run a serious risk of falling foul of age discrimination laws, unless they can show that their approach meets the test for justification.

This is not likely to be easy and those employers would do well to consider revising their policies before they find themselves in a tribunal.

By Carolyn Baines

Do I Have to Pay Bonuses to Employees on Maternity Leave?

The effect of maternity leave on an employee's bonus entitlement has long been a contentious issue with which employers have had to grapple. The problem stems from the fact that the Maternity and Parental Leave Regulations 1999 state that during ordinary maternity leave, a woman is not entitled to "remuneration." Remuneration is defined as wages or salary which are replaced during ordinary leave by statutory maternity pay (SMP). But, where does that leave employee bonuses? The following guidance will help employers approach the issue of determining whether to pay a bonus to an employee who has taken maternity leave during the relevant period.

Nature and Purpose of the Bonus

Employers should initially consider the exact purpose of the bonus:

- Is the bonus scheme contractual or discretionary?
- Is the bonus referable to work already carried out (i.e, a reward)?
- Is the bonus an incentive for future loyalty?
- Is the bonus referable to the company's performance or is it referable to the individual's performance?

Once the precise purpose for the bonus is established, the safest approach to bonus payments can then be decided. We set out below some general guidelines.

Discretionary Bonus

In the recent case of *Hoyland v. Asda Stores* (2006), the Court of Sessions ruled that a discretionary bonus constituted wages or salary and, therefore, the employer was within its rights not to pay the bonus during ordinary maternity leave.

That is not an end to the matter however, since an employee may try to claim that non-payment is still discriminatory under the Sex Discrimination Act. However, in *Hoyland*, this argument failed because

the Sex Discrimination Act actually permits the employer to deprive an employee who is on ordinary maternity leave of a benefit consisting in the payment of money, which is "regulated" by the employee's contract. Somewhat controversially, the Court ruled that the discretionary benefit in this particular case, although not contractual, was still regulated by the contract.

Contractual Bonuses

Performance-related. An employer is entitled to pro-rate a contractual performance-related bonus in respect of the time during which the employee was actually on maternity leave, except for the two-week compulsory maternity leave for which reduction is prohibited by the Equal Pay Act 1970 (EPA). Again, a challenge that this approach fell foul of the Sex Discrimination Act failed in *Hoyland*. The failure occurred because the Sex Discrimination Act allows employers to cease both those benefits regulated by the employment contract and those derived from the terms and conditions of employment. These parameters are clearly wide enough to catch contractual bonus payments.

Bonus for past service. Bear in mind that a bonus which relates to the employee's service before she went on maternity leave must still be paid, even if the bonus payment date falls after the date the employee has started her leave.

Incentive or Future Loyalty Payments

It is possible for a bonus to fall through the net, being neither contractual nor regulated by the contract. This might occur if the employer awards a discretionary bonus which is not based on the employee's performance, but is rather a function of being employed at a particular time. For example, in *GUS Home Shopping v. Green* (2001), a loyalty bonus was paid to employees contingent on the successful transfer of the department where the employee on maternity leave worked. It was held discriminatory to have deprived an employee on maternity leave of this bonus.

Conclusion

In light of the *Hoyland* case, it is becoming increasingly difficult for employees to claim bonuses whilst on maternity leave, whether the bonus is discretionary or contractual. Nonetheless, it is clear from case law that there are exceptions, and often the particular terms and conditions of the bonus scheme in question will be crucial.

By Elizabeth Jerome

The Information and Consultation Regulations Bare Their Teeth

The Information and Consultation of Employees Regulations 2004 (the Regulations) provide a framework that requires an employer covered by the Regulations to enter into some form of information and consultation agreement with its workforce when 10% of its employees formally request such an agreement. Formerly covering businesses with more than 150 employees, the scope of the Regulations increased, with effect from 6 April 2007, to cover undertakings employing at least 100 employees in the United Kingdom, and will increase again, with effect from 6 April 2008, to undertakings employing at least 50 employees. Therefore, small and medium-sized employers should also take note of the implications of the Regulations and keep an eye out for valid requests from staff to initiate negotiations concerning information and consultation agreements.

This increase in the scope of the Regulations coincides with the first penalty being issued by the Employment Appeal Tribunal (EAT) for failure to comply with the Regulations. In a case brought by the trade union Amicus against MacMillan Publishers Limited, the EAT has ordered MacMillan to pay a fixed penalty of £55,000 (the maximum penalty it can impose being £75,000). The penalty was imposed due to MacMillan's failure to arrange for a ballot of employees to elect the relevant number of information and consultation representatives (as per its obligation to do so under Regulation 19(1)),

Are you looking for HR support?

From time to time HR professionals approach us to see if we have any clients who are looking to appoint HR managers or HR directors in the UK. If you are a company looking to make appointments in your HR department, please feel free to contact us in case we know of any candidates wishing to make a move. Please understand, however, that this is the limit of our involvement. We do not charge fees for making introductions; nor do we recommend candidates, assess their suitability or vet their CVs. However, an informal introduction may save you the expense of engaging a recruiter. We will not introduce HR staff working for any client without the client's permission.

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and was issued following the Central Arbitration Committee's (CAC) declaration that the complaint submitted by Amicus was well founded.

This was not MacMillan's first breach of the Regulations. The company had failed to provide Amicus with information for the purposes of determining the number of people it employed in the United Kingdom (an obligation required under Regulation 5) and was ordered to do so by the CAC. MacMillan then failed to provide Amicus with information for the purposes of determining the number of people employed by the company at different sites in the United Kingdom and was again ordered to do so by the CAC. Following a declaration from the CAC that a valid request had been submitted to MacMillan to initiate negotiations concerning an information and consultation agreement, MacMillan failed to agree to the terms of an agreement. This resulted in the automatic application of the standard default information and consultation provisions, which required MacMillan to arrange a ballot to elect the relevant number of information and consultation representatives.

The EAT stated in its judgment: "*We recognise that these regulations impose on employers certain requirements which they might consider to be antithetical to their own needs, or potentially undermining their current arrangements. However, the regulations themselves determine the circumstances in which allowance will be made for pre-existing agreements. We think it appropriate, in fixing this penalty, to stipulate a sum which, within the limits imposed by the legislation, will deter others from adopting what can only be described as the wholly cavalier attitude to their obligations that has been demonstrated by this company.*"

The lesson is clear: employers ignoring a valid request to provide information, initiate negotiations or fulfil any other obligation provided by the Regulations do so at their peril. A relatively small militant minority can force an employer to begin negotiations concerning an information and consultation agreement, and this can lead to the employer having to comply with fairly onerous consultation obligations.

Employers can, however, seize the initiative by putting in place a form of information and consultation agreement which is largely of their own design, and which limits the scope for its staff to request a new information and consultation agreement. Under these circumstances, a request will only be automatically valid if it is made by 40% of the employees of the undertaking. If between 10–40% of the employees submit a request, the employer can ballot the employees in the undertaking and the request will only be valid if at least 40% of the employees in the undertaking, and at least 51% of those who actually vote in the ballot, choose to endorse the request.

A preexisting agreement can, therefore, reduce significantly the risk that a militant minority of its UK staff is able to force an employer to implement an onerous information and consultation agreement against the wishes of the vast majority of the staff. Remember, a preexisting agreement need not impose burdensome information and consultation obligations on the employer and will be entirely valid as long as it sets out how the employer is to provide information to its employees and seek their views concerning such information (and otherwise complies with the Regulations).

By David Andrews

What the Smoking Ban Means for Employers

Beginning 1 July 2007, smoking in all enclosed public areas and workplaces has been outlawed under the Health Act 2006 (the Act). The new law requires all employers to provide smoke-free workplaces and makes it a criminal offense to smoke, or to knowingly permit smoking, in any workplace or in any vehicle used for business. The legislation places an active duty on employers to police compliance with the Act. For example, employers must take reasonable steps to prevent personnel from smoking on their premises. Smoke-free areas must also display the requisite signage.

Facing fines of up to £2500, employers should ensure that they have taken adequate steps to implement and enforce the ban, including, for example, updating or introducing smoking policies and revising disciplinary materials and employee handbooks to reflect the changes. It is also important to ensure that the policy is consistently upheld. Arbitrary implementation of the ban—such as penalising some employees more than others for smoking—could lead to claims for breach of mutual trust and confidence and constructive dismissal. In addition, employees who are dismissed or disciplined for highlighting breaches of their employer's no-smoking policy could claim whistleblowing protection.

Hopefully, the widespread publicity surrounding the ban will help employers implement the new regime with a minimum of confrontation. Should you have any questions about the Health Act 2006, or require assistance in drafting a non-smoking policy or updating your handbook, a member of our team would be happy to help.

By Elizabeth Jerome

STOP PRESS:

1 October 2007 – Minimum Statutory Holiday Entitlement Increased
The Working Time (Amendment) Regulations 2007 increased the statutory minimum holiday entitlement from 4 to 4.8 weeks, equating to 24 days' holiday for a full-time worker working 5 days a week.

1 October 2007 – Increase in Minimum Wage
For workers aged 22 and over, the rate has risen from £5.35 to £5.52 per hour and for workers aged 18–21 from £4.45 to £4.60 per hour. The rate for workers aged 16–17 years has increased from £3.30 to £3.40.

24 October 2007 – Data Protection Act 1998 Comes Fully into Force
Manual filing systems in existence before 24 October 1998 are now required to comply fully with the Data Protection Directive (95/46/EC).

October 2007 – Commission for Equality and Human Rights Is Introduced
A single equality body, called the Commission for Equality and Human Rights, is introduced. The body will merge the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission, and take responsibility for the new laws outlawing workplace discrimination on grounds of age, religion or belief and sexual orientation. It will also be responsible for promoting human rights.

Forthcoming – Changes to the Sex Discrimination Act 1975 Expected in Early 2008
The Equal Opportunities Commission was recently successful in an application for judicial review of the Employment Equality (Sex Discrimination) Regulations 2005, which amended the Sex Discrimination Act 1975 (the SDA). The High Court found that the Regulations did not adequately implement the Equal Treatment Directive and the Government was obliged to make further amendments, which are expected to come into force in early 2008. As a result:

- Section 3A SDA will be revised to eliminate the statutory requirement for a comparator who is not pregnant or on maternity leave.
- The definition of "harassment" in section 4A(1)(a) SDA will be amended to eliminate the need for causation and to facilitate claims for harassment which are not "on the grounds of her sex" and claims relating to harassment by a third party.
- Section 6A SDA will be amended to clarify women's rights to bring discrimination claims relating to periods of maternity leave.

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