Birketts

WELCOME TO THE AUGUST 2018 UPDATE OF

Employment Law

IN THIS ISSUE

In this month's issue we look at a new European decision on whether a transfer of an undertaking could have taken place after a five month hiatus.

Liz Stevens
Professional Support Lawyer
01603 756474
liz-stevens@birketts.co.uk

We also look at a recent EAT decisions on whether an individual held a philosophical belief under the Equality Act 2010 and the consequences of a refusal to postpone a disciplinary hearing.

A number of recent government responses and select committee reports have now been published and are covered in our 'Quick fire' items. We also include our usual monthly Immigration update.

Don't forget to book your place at one of our annual update sessions, which will provide an essential overview of all the recent and forthcoming employment law developments of interest to the HR community. Dates in October are booking up quickly at all four of our office locations: www.birketts.co.uk/events.

Cambridge | Abigail Trencher
abigail-trencher@birketts.co.uk
01223 326622 | 07983 385842

Chelmsford | Kevin Palmer
kevin-palmer@birketts.co.uk
01245 211254 | 07771 517547

Ipswich | Catherine Johnson
catherine-johnson@birketts.co.uk
01473 299174 | 07786 265654

Norwich | Jeanette Wheeler
jeanette-wheeler@birketts.co.uk
01603 756427 | 07983 519812

IN THIS ISSUE

@birkettsllp Birkettsllp @birkettsllp

TUPE: five month cessation did not preclude transfer

The European Court of Justice (ECJ) has decided that a transfer of an undertaking within the meaning of the Acquired Rights Directive (ARD) could have taken place notwithstanding a five-month gap in economic activity.

Colino Sigüenza v Ayuntamiento de Valladolid and others, ECJ (Case C-472/16)

Facts

The claimant, Mr Colino Sigüenza, worked as a music teacher at a Spanish music school, owned by the local authority but operated by a private company (Musicos). Following a fall in student numbers and a dispute with the local authority, in April 2013 Musicos dismissed all of its staff and ceased activities at the music school. Following a tender process, a contract to operate the school was awarded to In-pulso and the school reopened in September 2013. The same premises, instruments and resources were used but none of the previous teachers were recruited by In-pulso.

Mr Sigüenza and some of his colleagues brought claims for unfair dismissal against Musicos, In-pulso and the local authority, all of which failed. On appeal, the Spanish court referred the case to the ECJ to determine:

(i) whether there was a transfer of an undertaking for the purposes of the ARD

(ii) if so, were the dismissals in April for 'economic, technical or organisational' (ETO) reasons entailing changes in the workforce, or were they caused by the transfer, and, therefore, void?

> *"The fact that an undertaking is temporarily closed and has no existing employees is a relevant factor but is not determinative...*

ECJ decision

The ECJ has decided that the five month gap in economic activity did not preclude the existence of a transfer of an undertaking. The fact that an undertaking is temporarily closed and has no existing employees is a relevant factor but is not determinative, particularly as in this case, three of the five months were school holidays. Since this was an 'asset reliant' case (the musical instruments, facilities and premises being essential to the conduct of the economic activity), the fact that none of the workers had transferred

did not mean that a transfer of an undertaking had not occurred. Whether there had been such a transfer was for the referring court to decide.

In relation to the question of whether the dismissals were for an ETO reason entailing changes to the workforce, it was necessary to take into account the objective circumstances of the dismissals. The reason for the dismissals was the fact that Musicos could no longer pay its staff, and the dismissals took place well before the date In-pulso took over the operation of the music school. In the ECJ's view, these factors pointed towards the existence of an ETO reason for the dismissals.

"... the purpose, nature and length of the cessation are all relevant in determining whether or not the organised grouping of employees continues to exist.

Consequences

In domestic case law, it is already well accepted that a temporary cessation of activities does not preclude the existence of a TUPE transfer. In the context of a service provision change, the 'organised grouping of employees' does not have to be engaged in the activity immediately before the transfer. It will depend on the circumstances in each case but the purpose, nature and length of the cessation are all relevant in determining whether or not the organised grouping of employees continues to exist.

QUICK FIRE

Caste discrimination

The Government Equalities Office (GEO) has published its response to the consultation paper issued in March 2017, seeking views on whether legislation should be introduced under the Equality Act 2010 in order to protect against caste discrimination. Caste is not currently a protected characteristic under the Equality Act, although previous case law has suggested that caste could be protected to the extent it is bound up with ethnic origin.

The Government has decided to rely on emerging case law in this area, rather than extending the provisions of the Equality Act 2010 to include caste. It has committed to keeping the situation under review, but will not be making any legislative changes in the foreseeable future.

Philosophical belief

The Employment Appeal Tribunal (EAT) has considered whether an employee's belief in the right to own the intellectual property of her own creative work amounted to a philosophical belief under the Equality Act 2010.

Gray v Mulberry Company (Design) Ltd UKEAT/0040/17

Facts

The employee, Ms Gray, was recruited as a market support assistant to Mulberry. She was provided with a contract of employment and an agreement protecting the company's intellectual property rights in the designs of its luxury handbags. The agreement provided for the assignment of the copyright and other proprietary rights to Mulberry in respect of all works and designs she created in the course of her employment.

Ms Gray refused to sign the agreement on the basis that it could interfere with her own work as a writer and film-maker. The agreement was amended to make it clear that the assignment of the intellectual property only applied to work relating to Mulberry's business, but Ms Gray still refused to sign it. She was eventually dismissed and brought a claim for direct and indirect discrimination on the grounds of belief. Her stated belief was 'the statutory human or moral right to own the copyright and moral rights of her own creative works and output'. Ms Gray's claim was rejected on the basis that her asserted belief was not sufficiently cohesive to form any cogent philosophical belief system. Her dismissal was, in any event, due to her refusal to sign the intellectual property agreement rather than because of her philosophical belief. The tribunal was satisfied that there was no direct or indirect discrimination.

> *... her asserted belief was not sufficiently cohesive to form any cogent philosophical belief.*

EAT decision

The EAT dismissed the employee's appeal. It agreed with the tribunal's conclusion that her belief did not have the necessary level of cogency or cohesion to amount to a philosophical belief within the meaning of the Equality Act 2010. In addition, there was no suggestion at the time that her refusal to sign the agreement was motivated by a philosophical belief. Her objections could be described as commercial in nature, designed to protect her own private interests in selling her work. It was not an expression of her belief.

This is a useful decision to illustrate the requirements for such a belief to be protected.

Consequences

There are relatively few cases dealing with the question of what is a 'philosophical belief' for the purposes of protection under the Equality Act 2010. This is a useful decision to illustrate the requirements for such a belief to be protected. It also highlights the difficulty faced by a claimant who failed to make any mention of her belief during conversations with her employer, in persuading a tribunal that her treatment was related to that belief.

QUICK FIRE

Independent review of modern slavery

An independent review of the Modern Slavery Act 2015 (MSA 2015) has been announced by the Home Office, following publication of a report estimating the economic and social costs of modern slavery in the UK as being up to £4.3bn a year.

The independent review will consider the operation and effectiveness of the MSA 2015, as well as identifying potential improvements. It will gather evidence and seek views from relevant stakeholders on how the Act is operating in practice, how effective it is and whether the legal framework is fit for purpose now and in the future. It will look, in particular, at the nature of modern slavery offences, the provisions around legal access and compensation to victims, and improving support given to child victims.

Currently, businesses with an annual turnover of £36m and above are required to publish a statement to outline what is being done to prevent and tackle modern slavery in its operations and supply chain. The review will consider whether more needs to be done to strengthen the existing provisions of the MSA 2015 and improve compliance.

The review is expected to be completed by the end of March 2019.

Refusal to postpone disciplinary hearing

The Employment Appeal Tribunal (EAT) has considered whether an employer's refusal to postpone a disciplinary hearing, due to the unavailability of the employee's trade union representative, resulted in an unfair dismissal.

Talon Engineering Limited v Smith, UKEAT/0236/17

Facts

The employee, Mrs Smith, was employed by the respondent for over 21 years before her summary dismissal for gross misconduct. She had been invited to a disciplinary hearing, which was then postponed for three weeks as a result of a period of sick leave followed by annual leave. The rescheduled hearing was due to take place on 29 September 2016, but Mrs Smith's trade union representative was unavailable on that date and for a further two weeks. The respondent refused a further request to postpone the hearing, on the basis that it would result in an unacceptable delay and that it was only required to agree to a postponement of up to five days under the provisions of section 10(5) Employment Relations Act 1999 (right to be accompanied to a disciplinary hearing).

"*The employer should have allowed a further postponement of the hearing to allow Mrs Smith's trade union representative to accompany her.*

The disciplinary hearing went ahead in the absence of both the employee and her trade union representative, and the decision was reached to summarily dismiss her. This decision was upheld on appeal.

Mrs Smith brought a claim for unfair dismissal, which was upheld by an employment tribunal. The tribunal was satisfied that it was not reasonable in the circumstances to proceed with the disciplinary hearing in her absence. The employer should have allowed a further postponement of the hearing to allow Mrs Smith's trade union representative to accompany her. The employer appealed to the EAT.

EAT decision

The EAT dismissed the employer's appeal, upholding the finding of unfair dismissal. In relation to the right to be accompanied, the EAT confirmed that whilst a breach of the right under section 10 would almost certainly result in a finding of unfair dismissal, the corollary of that cannot be right. The unavailability of the trade union representative for a

... it was unreasonable for the respondent not to postpone the hearing for a further short period of time.

period of more than five working days does not mean, for the purposes of a claim of unfair dismissal, that an employer is entitled to proceed with the disciplinary hearing in the absence of the employee. The tribunal was entitled to conclude that it was unreasonable for the respondent not to postpone the hearing for a further short period of time. The provisions of section 10 Employment Rights Act 1999 should not act as a fetter on the tribunal's discretion to reach a finding that a dismissal was unfair.

Consequences

This decision highlights the potential risk for employers in electing to proceed with a disciplinary hearing in circumstances where an individual's chosen representative is not available, even if this is for more than the five days permitted under section 10 Employment Relations Act 1999. Whilst a decision to proceed will mean there is no breach of the statutory right to be accompanied provisions, a decision to dismiss may still be regarded as unfair. In this case, the tribunal considered dismissal in the employee's absence to be a gross overreaction on the part of the respondent, particularly in view of her length of service, and her previously unblemished record. Employers should always consider a request for a postponement of a disciplinary hearing on its merits, even if it is for a period of more than five days.

Employers should always consider a request for a postponement of a disciplinary hearing on its merits.

QUICK FIRE

Equality Act enforcement

The Women and Equalities Committee has launched a new inquiry into the enforcement of the Equality Act 2010. It will collect evidence on the enforcement of the Act and the effectiveness of the Equality and Human Rights Commission in its enforcement. It is seeking evidence on how easy it is for the public to understand and enforce their statutory rights, on the effectiveness and accessibility of tribunals and other enforcement mechanisms, and on the effectiveness of remedies and penalties in discrimination cases.

The deadline for submissions is 5 October 2018.

QUICK FIRE

Sexual harassment in the workplace

The Women and Equalities Committee has published a new report on sexual harassment in the workplace, with a five-point plan to address the issue.

The report calls for sexual harassment to be put at the top of the agenda by employers and regulators, with mandatory requirements, sanctions for breaches and proactive enforcement measures to be introduced. It suggests that employers are given a new statutory duty to take reasonable steps to protect workers from harassment and victimisation, alongside a statutory code of practice to set out how the duty will work.

The report also suggests that regulators should take a more active role in tackling sexual harassment and that the enforcement process should be improved to make it easier for individuals to raise concerns and to bring a claim in the employment tribunal. In particular, it suggests that the time limit for bringing a claim for sexual harassment should be increased to six months, punitive damages should be available and a discretionary uplift of 25% where there has been a breach of the statutory code. There should also be a presumption that the employer should be required to pay the claimant's legal costs, if it loses a claim for sexual harassment.

In addition, the report calls for the use of non-disclosure agreements to be better controlled and regulated, including the use of standard, approved confidentiality clauses. This would have an impact on the use of settlement agreements in cases where sexual harassment is alleged.

Finally, the report suggests the collection of robust data on the incidence of sexual harassment in the workplace and how it was dealt with.

The Government has yet to publish any response to the Committee's report and it remains to be seen whether any of these proposals will be taken forward.

> *"... the time limit for bringing a claim for sexual harassment should be increased to six months...*

... the median gender pay gap is around 18% nationally, but in some organisations it is up to 40%.

QUICK FIRE

Gender pay gap reporting

The Business, Energy and Industrial Strategy (BEIS) Committee has published a report on gender pay gap reporting, as part of its ongoing inquiry into aspects of executive pay and the gender pay gap in the private sector.

According to the report, the median gender pay gap is around 18% nationally, but in some organisations it's up to 40%. The report makes a number of recommendations for strengthening gender pay gap reporting and for closing the gap. The recommendations include:

- extending reporting obligations to companies with 50 or more employees from 2020
- requiring a narrative explanation for pay disparity alongside an action plan to reduce the pay gap (this is currently encouraged, but not mandatory)
- including partner remuneration in pay gap reporting
- giving the Equalities and Human Rights Commission specific enforcement powers, with the ability to levy fines for non-compliance.

The Government has yet to publish any response to the Committee's report.

In the meantime, the Government Equalities Office (GEO) has published new guidance, What Works with evidence-based practical recommendations on how to close the gender pay gap.

Immigration update

Clare Hedges
Senior Associate - Head of Immigration
01223 326605
clare-hedges@birketts.co.uk

Janice Leggett
Immigration Consultant
01245 211277
janice-leggett@birketts.co.uk

... the Home Office has launched a toolkit to help employers, industry groups and community groups in the UK to communicate the EU Settlement Scheme to their staff.

EU Settlement Scheme

A new Appendix EU has been added to the Immigration Rules, to deal with the roll out of the Government's new EU Settlement Scheme. This reflects the draft rules discussed in our last update.

NHS employees, university staff and students in the North West of England will be taking part in a private pilot of the new application process. Approximately 4,000 EU citizens will be invited to make real applications for settled status through the new digital process as part of a managed live trial. The pilot is due to begin on 28 August 2018 and will allow those working on the scheme to test the system using real applicants ahead of the launch of the scheme's phased rollout later this year. Those who go through the process will be granted indefinite leave to remain, assuming they are eligible.

Meanwhile the Home Office has launched a toolkit to help employers, industry groups and community groups in the UK to communicate the EU Settlement Scheme to their staff. The toolkit can be accessed here.

Should EU nationals wait for the new scheme?

The Government has been keen to encourage EU nationals to wait for the new settled status scheme to be rolled out to them, and the employer toolkit repeatedly emphasises 'don't rush, you have until 30 June 2021 to apply.'

However, anyone with evidence that they have already been exercising EU Treaty rights in the UK for over five years and who wishes to naturalise as a British citizen, would be well advised to consider acting now. This is because the new Settlement Scheme does not allow for the backdating of indefinite leave to remain. Those who obtain this status under the new scheme, will then need to wait for at least 12 months before they can apply for naturalisation (unless married to a British national). However, it is possible to apply for a permanent residence card now and have this backdated, allowing a naturalisation application to be made before we leave the EU.

Please contact a member of our Immigration Team for advice on your individual circumstances, to identify the best solution for you and your family.

Birketts is continuing to support employers with seminars for their EU national staff.

Seminars for EU nationals

Birketts is continuing to support employers with seminars for their EU national staff. These cover the new Settlement Scheme, the current permanent residence system and the pros and cons of applying for naturalisation as a British citizen. We are able to provide generic guidance on what the best options are for different groups of people, and provide an outline of the processes and what you need to apply. There is also plenty of time at the end for questions. For further details please speak to Clare Hedges or Janice Leggett in our Immigration Team.

CBI report: Open and controlled - a new approach to immigration after Brexit

The Confederation of British Industry (CBI), the UK's leading employers' organisation which represents companies from all sectors of UK business, recently published a report outlining why immigration matters to 18 different sectors of the economy.

The report's main findings are that:

1. immigration is valuable to all sectors of the UK economy and delivers significant economic benefit
2. most business sectors require a combination of skill levels and are inter-linked through supply chains, so a whole economy approach is required
3. mobility is as important as migration, particularly for the UK economy where services play such a vital role
4. the current non-EU immigration system is inaccessible for most firms and is not the solution for EU nationals
5. businesses recognise that free movement is coming to an end and want to restore public trust in immigration.

The CBI has made 17 policy recommendations for a reformed immigration system.

The CBI has made 17 policy recommendations for a reformed immigration system. These include:

- introduce compulsory registration for EU nationals as soon as they arrive in the UK
- restrict EU citizens ability to stay to three months unless they can prove that they are working, studying or are self-sufficient.

We are, of course, still waiting for the Government's promised White Paper on immigration.

The full CBI report can be found here.

Tier 2 RCoS – light at the end of the tunnel?

... the minimum salary required to succeed in the July allocation round was £41,000 which is the lowest it has been since November 2017.

Tier 2 sponsors are now well aware of the limit on the number of Restricted Certificates of Sponsorship (RCoS) available each month.

The cap was exceeded again in July but there was a glimmer of hope. Following the Home Secretary's decision to remove doctors and nurses from the quota for Tier 2 General RCoS, the minimum salary required to succeed in the July allocation round was £41,000 which is the lowest it has been since November 2017.

Early indications are that the minimum salary in August was at around the same level.

Tier 2 and 5 Priority Change of Circumstances Service

The telephone number for the priority service has recently changed to 0114 207 1315.

Tier 2 and 5 sponsors who wish to expedite a request for the following can request a priority service at the cost of £200:

- in year certificate of sponsorship (CoS) allocation
- follow on CoS allocation
- add new level 1 user
- replace an authorising officer (AO)
- add a representative.

The telephone number for the priority service has recently changed to 0114 207 1315. The line is open from 8:30am to 4:30pm, Monday to Thursday, but only 50 requests are accepted each day, so the earlier you call the better. Decisions normally take up to five working days, which is much quicker than standard processing.

Tier 5 Youth Mobility Workers - restrictions

Tier 5 Youth Mobility Workers are not allowed to work as a professional sports person.

Many employers are happy to recruit Commonwealth nationals under the age of 30, who can work with a Tier 5 Youth Mobility visa. However, it is important to bear in mind the restrictions that apply to this type of leave. In particular, Tier 5 Youth Mobility Workers are not allowed to work as a professional sports person.

The definition of a 'professional sports person' is surprisingly wide, as it is, someone, whether paid or unpaid, who:

- is providing services as a sports person, playing or coaching in any capacity, at a professional or semi-professional level of sport, or
- being a person who currently derives, who has in the past derived or who the Secretary of State has reason to believe is seeking in the future to derive, a living from playing or coaching, is providing services as a sports person or coach at any level of sport, unless they are doing so as an 'amateur' in a charity game

- in the definitions of 'amateur' and 'professional sports person', 'derive a living', 'paid' or similar references include payments made in kind.

This means that Tier 5 Youth Mobility Workers should not be playing for semi-professional teams (even if unpaid), or working as coaching assistants in schools. The Home Office has been cracking down on this recently, amidst concerns that young Brits are missing out on development opportunities due to competition from migrant workers.

The restriction on working as a professional sports person applies to many, but not all, types of visa. If you do want to recruit a migrant for this type of role, please contact a member of our Immigration Team to discuss what options might be available.

Migration statistics

"... there were still around 90,000 more EU citizens arriving in the UK than leaving.

The quarterly report released by the Office for National Statistics (ONS) on 23 August 2018 shows that net migration is now at 270,000. The figures have stabilised since the peaks seen in 2015 and 2016.

There has been a reduction in the number of EU citizens coming to the UK, with overall levels now comparable to those seen in 2012. In particular there were fewer western European nationals coming to work here. However, there were still around 90,000 more EU citizens arriving in the UK than leaving.

The quality of the data relied upon for the report continues to be questioned, with the ONS itself acknowledging that there have previously been anomalies in the estimates received from the International Passenger Survey regarding students. The problems with measuring net migration may provide further ammunition for those arguing that the government should drop its target of reducing net migration 'from tens of thousands to hundreds of thousands.

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team.