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Insights

UK HR TWO MINUTE MONTHLY: TUPE TRANSFERS TO MULTIPLE TRANSFEREES, PUBLIC INTEREST TEST IN WHISTLEBLOWING CASES AND UNFAIR DISMISSAL

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SUMMARY

Our April 2021 update includes a case which signals a potentially significant change in approach to TUPE transfers involving multiple transferees. We also consider a recent whistleblowing case in which it was considered that a disclosure of information affecting only one person could nevertheless be in the 'public interest', and provide an update on other recent points of note.

An employee can TUPE transfer to multiple transferees

In an important decision, the Employment Appeal Tribunal (EAT) has held that where a TUPE service provision change involves multiple transferees, the contract of employment of a transferring employee can be split between them, with the individual's duties divided between the transferee employers. This has the effect of splitting the employee's employment between employers with the employee working for (in this case) two employers. This is a departure from the more established "assignment" approach of dividing employees between transferees so that each employee works for only one transferee employer.

The case involved a transfer of a service from a single contractor to two new contractors, operating in different geographical territories. The EAT said there was no reason in principle why, following a service provision change, the employee could not hold two or more contracts of employment with different employers at the same time, provided that the work to be carried out under each contract was identifiable and separate.

In reaching this decision, the EAT applied the 2020 decision of the European Court of Justice in ISS Facility Services v Govaerts, in which it was held that an employee could transfer to multiple transferees in proportion to the tasks performed, provided that such a division was possible and did not adversely affect the worker's rights and working conditions. The *Govaerts* decision pre-dated the end of the Brexit transition period, and is therefore retained EU law, which must still be applied.

However, *Govaerts* applies only to "traditional" TUPE transfers under regulation 3(1)(a) of TUPE. This case did not involve a "traditional" TUPE transfer, it involved a service provision change under regulation 3(1)(b) of TUPE which is domestic legislation. There was therefore no requirement under the principles of EU retained law to apply *Govaerts* to a service provision change, but the EAT held that it would be undesirable to take a different approach to the two types of transfer under TUPE. In short, the EAT decided to apply an ECJ decision to domestic law where it was under no obligation to do so.

McTear Contracts Ltd v Bennett and others; Mitie Property Services UK Ltd v Bennett and others

Why this matters

The decision marks a change of approach to previous case law, in which the 'assignment' test was applied to determine to which single transferee (if any) each employee should transfer. Whilst the facts of this case may make it relatively straightforward for an individual to split his time between two employers following a transfer, this will not be the case in many other situations. This will be particularly challenging in cases involving numerous employees and multiple transferees. In such cases, a split may not be feasible, which emphasises the importance of clear contractual provisions to determine which party will be responsible for which employees, and where the associated costs and liabilities will lie. The split also has to be one where there are no adverse effects on the individual's rights and working conditions, and a *Govaerts* type of split could have this effect. The other point of note is the EAT following EU law without any obligation to do so, but this was probably more pragmatism than principle.

A disclosure of information relevant to only one person can be a matter of public interest for a whistleblowing claim

The Employment Appeal Tribunal (EAT) has held that it could be reasonable for a worker to believe that a disclosure was in the public interest for the purposes of a whistleblowing claim even where the information disclosed affected only one person. "Public interest" is not defined in the relevant legislation, and depends on all the facts and circumstances. Parliament's intention in introducing this requirement was to prevent disclosures that served only the private or personal interests of the individual attracting the enhanced protection available to whistleblowers.

Case law has identified 4 key factors when considering whether a disclosure is in the public interest, namely:

- the number of people whose interests the disclosure involved;
- the nature of those interests and the extent of the impact;
- the nature of the wrongdoing disclosed; and
- the identity of the alleged wrongdoer.

The case involved disclosures made by a consultant solicitor regarding alleged overcharging of one client of a law firm, in the context of recovering legal costs following litigation.

The EAT commented that a matter of 'public interest' is not necessarily the same as one that interests the public. The EAT emphasised that solicitors, as officers of the court, are held to high standards of conduct. This should be taken into account when considering the public interest test. A disclosure of information relevant only to one person could be a matter of public interest in these circumstances. The individual must have a genuine and reasonable belief that the disclosures were in the public interest. However, it was not necessary for the public interest to be the individual's only reason for making the disclosures, or even his predominant motive.

Why this matters

The case emphasises that there is no need for a large group to be impacted in order to satisfy the public interest test. The EAT's reasoning will be of particular relevance to employers operating in regulated sectors, including those in financial or legal services. In many cases, the key question may not be whether the individual qualifies as a whistleblower, but rather, what was the reason for the treatment which is the subject of the claim?

Dobbie v Felton t/a Feltons Solicitors

Dismissal for refusal to wear a facemask was fair

A delivery driver was summarily dismissed after he refused to wear a facemask whilst on a client's site. The driver remained in the cab of his vehicle, but was twice asked to wear a facemask in line with the client's COVID requirements. After he refused to do so, the client complained to his employer and banned him from their site.

The reason for dismissal was expressed as breaching a requirement to maintain good relationships with clients and to co-operate in ensuring a safe working environment. The tribunal found that the dismissal fell within the range of reasonable responses. The employer had conducted a reasonable investigation and disciplinary process, and had a genuine belief that the employee was guilty of misconduct. It was entitled to take into account the importance of maintaining good relationships with its clients. The driver's handbook stipulated that customer instruction regarding PPE must be followed. The fact that the employee continued to insist that he had done nothing wrong caused concern as to his future conduct and helped justify the employer's decision.

Why this matters

Whilst this is a first instance decision and not binding, such issues may arise more frequently as lockdown restrictions are eased and workers return to workplaces which are subject to additional rules for COVID safety purposes. The case serves as a reminder of the importance of clear policies and instructions as regards such requirements.

Kubilius v Kent Foods Ltd

Round up of other developments

Protection against detriment on health and safety grounds will be extended to workers from 31 May 2021. The right to bring an Employment Tribunal claim for a detriment in certain health and safety circumstances is currently restricted to employees. Under section 44 of the Employment Rights Act, a claim can be brought where an employee is subjected to a detriment for taking action because they reasonably believed that being at work placed them or someone else in serious, imminent danger. The previously little-used provision has come into focus as a result of the impact of the pandemic and its impact on places of work. Following a legal challenge, the protection is due to be extended to the wider category of workers from 31 May 2021.

Employment tribunal statistics for October - December 2020 have been published. Cases have increased again, with multiple claims up by 82% and single claims increasing by 25% compared with the same quarter in the previous year.

BCLP has assembled a COVID-19 Employment & Labor taskforce to assist clients with employment law issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com.

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