July 2011

Review

Employment

In this month's Review we highlight three cases reported in July. For once, they are all pro-employer!

To what extent does TUPE constitute a defence to an equal pay claim?

TUPE and equal pay, possibly the two employment issues that employers dread most! Not a lot of laughs in either, as a rule.

In ***Skills Development Scotland Co Ltd v Buchanan and Holland the EAT*** has, however, recently given a useful decision for employers which inherit employees on high salaries via TUPE and subsequently face equal pay claims from their existing (usually) female staff that they are being paid less than their new male comparators. It makes it clear that TUPE is a potential defence to an equal pay claim (that much we knew already) and that the mere passage of time by itself does not change this.

Ms Buchanan and Ms Holland were both Customer Service Managers at SDS. They found out they were being paid approximately £10,000 less than their new male colleague, Mr Sweeney. They presented equal pay complaints in the Employment Tribunal. SDS defended the claims by arguing that the pay disparity was down to TUPE, as Mr Sweeney had previously transferred to it from a different employer. At the date of the relevant transfer, Mr Sweeney had been on a higher salary than his new female colleagues. As SDS was required under TUPE to honour his contractual terms, this was the reason why he had been paid more than them at that time.

The claimants accepted that TUPE may have justified the original difference in pay, but said this was not sufficient to justify the continuing pay disparity – the TUPE transfer had taken place some 6 years earlier and yet they were still being paid roughly £10,000 pa less than him. The Employment Tribunal agreed and said that TUPE was no defence to their equal pay claims. It said that Mr Sweeney's salary should have been red-circled and frozen, as SDS was under no obligation to continue to increase his salary, thus maintaining (at least prolonging) the pay differential.

The EAT disagreed. In its view the Tribunal had misinterpreted Mr Sweeney's contract. This entitled him to whatever pay increases were being awarded by SDS under its "normal arrangements". By awarding him annual pay increases SDS had therefore simply been complying with its contractual obligations. Furthermore, the Tribunal had lost sight of the key issue, namely whether there had been any sex discrimination in relation to the pay of the claimants and their male comparator. If, as was accepted, the reason for the initial pay difference was the TUPE transfer then the mere passage of time did not cause this gender-neutral explanation to lose its "non-sex" character. The mere fact that SDS did not address its mind to TUPE each time it increased Mr Sweeney's salary did not mean that TUPE was not the reason for the continuing pay differential. As TUPE was and remained the cause of the pay disparity SDS was not required to justify the difference in pay.

Is this fair? Quite possibly not, but the EAT was at pains to point out that the purpose of the equal pay provisions is to tackle gender pay discrimination, not to achieve fair wages.

Does this mean that employers are no longer under an obligation to take steps to narrow the pay gap between male and female staff who TUPE-transfer across on different terms and conditions for doing the same job? Not quite. In this case SDS had a contractual obligation to increase Mr Sweeney's salary. Furthermore, there was no suggestion that the initial pay differential was down to anything other than the fact the employees had TUPE-transferred across on different terms and conditions. If the reason for any initial pay differential had been gender-related, SDS would not have been able to point simply to the TUPE transfer to justify any continuing pay differentials. Whilst this decision may be helpful, employers still need to satisfy themselves that the real reason for any pay differential is the effect of TUPE and that there are no gender-related factors at play.

In any event it still remains good practice to be seen to seek to address any pay irregularities over time, even if they derive from a TUPE transfer. If they are not addressed this will only cause disquiet amongst the workforce and increase the likelihood of a legal challenge.

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Do employees have a right to legal representation at a disciplinary hearing?

Not if they work for a private sector employer. The position will usually be the same for public sector employees.

The Employment Relations Act 1999 provides that workers have the right to be accompanied by a trade union official or a fellow worker at any disciplinary hearing, but not by a lawyer. But that is not quite the end of the story. In recent years there have been a number of cases (generally involving public sector employees) in which employees have argued that they should be entitled to legal representation at disciplinary hearings if the outcome could have serious implications for their career. The position has now been clarified following the Supreme Court's decision earlier this month in ***R (on the application of G) v The Governors of X School*** in which it said that an employee did not have the right to be legally represented at a disciplinary hearing.

The key issue in this case was whether the School's decision not to allow a teaching assistant to be legally represented at a disciplinary hearing involving allegations of inappropriate behaviour with a 15 year old boy breached his human rights, in particular his right to a fair trial under Article 6 of the European Convention on Human Rights.

The right to a fair trial is only triggered in proceedings where an individual's civil rights are being determined. The civil right in question in this case was the employee's right to practise his profession as a teaching assistant and work with children generally. The nature of the allegations against the employee meant the School had a duty to inform the Independent Safeguarding Authority (ISA) of the outcome of the disciplinary proceedings. This could have resulted in the employee being prohibited from working with children indefinitely, effectively bringing his teaching career to an end. The employee argued that because the outcome of the disciplinary proceedings would have a powerful influence on any subsequent ISA proceedings, he was entitled to legal representation in both proceedings.

The Supreme Court disagreed. It said, by a majority, that the right to a fair trial did not apply to the disciplinary proceedings. It accepted that it applied to any proceedings before ISA, but said it was not the function of the School to determine the civil right in issue. Rather, it was only concerned with the employee's employment at the school and that its disciplinary proceedings did not trigger Article 6.

The Supreme Court did not go so far as to say that employees will never be entitled to legal representation at a disciplinary hearing. It seems that Article 6 could be engaged if the disciplinary proceedings in question would determine an employee's right to work in his chosen field. In the vast majority of cases this will not be the case, as disciplinary proceedings usually only determine an employee's right to work for a particular employer.

Should employees on long-term sick leave accrue holiday indefinitely?

And finally, with the holiday season upon us, it seems only right that we should highlight a recent case working its way through the European Courts which may curtail the holiday that employees can claim to accrue during periods of long-term sick leave.

In ***KHS AG v Schulte***, a German case that has been referred to the ECJ, the Advocate General said that whilst workers on long-term sick leave continue to accrue their "working time" holiday entitlement, there is nothing in EU law which says this should go on ad infinitum. In her view it may be appropriate to place limits on the amount of holiday that can be carried over from one leave year to the next. Whilst a carry-over period of six months would be insufficient, the Advocate General suggested that it may be lawful for any unused annual leave to expire 18 months from the end of the holiday year in which the holiday accrued. Member States would, however, be at liberty to include more generous provisions.

Unfortunately the Advocate General's Opinion is not binding on the ECJ and it may be therefore that when it considers this case it concludes otherwise. We simply have to keep our fingers crossed.

FURTHER INFORMATION

For more information relating to this newsletter, please contact:

Caroline Noblet
Partner
E: caroline.noblet@ssd.com

Nick Jones
Partner
E: nick.jones@ssd.com

Charles Frost
Partner
E: charles.frost@ssd.com

Matthew Lewis
Partner
E: matthew.lewis@ssd.com

David Whincup
Partner
E: david.whincup@ssd.com

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