

# Employment Law Update

May 2006

In this Update we highlight some recent key decisions concerning dismissal and disciplinary procedures and TUPE. Employers ignore these decisions at their peril!

## Unfair Dismissal

The facts of *Alexander & Hatherley v Bridgen Enterprises* were that the employer was in a 'catastrophic financial position' and, after volunteers, had to select nine workers for redundancy. It did so by drawing up selection criteria and applying a scoring matrix accordingly. Those below the 'cut off' score were made redundant.

The tribunal held that the employees who complained of unfair dismissal, by reason of unfair selection, would have been dismissed in any event by reason of their low scores. Ordinarily, therefore, the dismissals were not unfair. However, noting the requirements of the Statutory Dismissal and Disciplinary Procedure (DDP) of the Employment Act 2002, the tribunal found that the dismissals had automatically to be considered as unfair and compensation awarded accordingly.

The tribunal found that the employees were informed of the selection criteria before scoring, the procedures did not operate unfairly, they received the scores they ought to have received and had no legitimate complaint. Despite that, the reason for the automatic unfairness was simply that the employees were not shown their individual scores before the meeting in which they were advised of their selection and dismissal.

On appeal, the EAT upheld the tribunal's decision. It confirmed that "in order to comply with the statutory provisions an employer should provide to the employee not only the basic selection criteria which have been used, but also the employee's own assessment."

### *Comment*

Step 2 of the DDP provides that the meeting necessary to discuss a contemplated dismissal must not take place unless (a) the employer has informed the employee what was the basis for contemplating dismissal or disciplinary action and (b) the employee has had a reasonable opportunity to consider his response to that information.

*Bridgen Enterprises* shows how the DDP may operate to render ordinarily fair dismissals unfair and gives an example of what is required in a redundancy dismissal and. However, in conduct and capability dismissals, the EAT goes on to say that although 'stating the basis for contemplating dismissal' does not mean that 'detailed evidence' must be provided, it does mean that "the employee must be given sufficient detail of the case against him to enable him properly to put his side of the story."

In many, if not most cases, it is likely that the only way an employer can be sure that it has provided 'sufficient detail of the case against the employee to enable him properly to put his side of the story' will be to provide the detailed evidence which the EAT has said need not be provided! The risk otherwise is that on seeing the detailed evidence the employee says 'if only I'd seen that before, I could have explained it.'

The net effect of this decision is that employers need to consider more carefully just what information they must ensure is given to an employee before any disciplinary or dismissal meeting.

## Compensation Awards

In *Knapton v ECC Card Clothing Ltd*, the EAT has held that if, following dismissal, an employee chooses to draw his pension early, the value of his pension benefits cannot be taken into account in calculating any compensatory award.

### Comment

This case may be particularly important in dismissals of older workers. Where an employer may have expected that an unfair dismissal complaint with a substantial future loss of earnings could be settled at an affordable level where the employee can draw a significant pension immediately on termination, those expectations will have to be revised.

*Knapton* has the effect of providing a windfall for the employee in such circumstances who can be compensated for full future loss of earnings even

though he suffers only a partial loss of income because of the additional pension being received at an early stage.

Though strong arguments may be made that this decision is flawed and wrong in principle, employers may have to assess contingent liabilities on the basis that it will be followed.

#### **A Timely Reminder**

NSM Music Ltd v Leefe provides an important reminder to employers to take seriously the time limits imposed by the Employment Tribunal rules. The employer here failed to lodge its defence within the 28 days provided by the Tribunal. It was thereafter barred from taking further part in the proceedings and, in a short judgment, the Tribunal ordered the employer to pay an award of £48,000.

#### *Comment*

An expensive mistake. This case is also indicative of the hard line which many Tribunals seem willing to take towards those who breach their rules.

#### **Transfer of Undertakings (TUPE)**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 came into force on 6th April, replacing the 1981 regulations.

Perhaps the most important changes are:

- to make clear that outsourcing and insourcing is covered by TUPE
- a new duty on the transferor to provide 'employee liability information' at least a fortnight before the transfer
- to allow variations to contracts of employment, if agreed with union/employee representatives, where the transferor is insolvent
- the transferor will be liable (jointly with the transferee) for awards for failure to inform and consult with a trade union or employee representative (see below)

#### *Comment*

The 2006 Regulations are complicated and many questions of interpretation will have to be resolved in the tribunals (so no change there). In the meanwhile, anyone contemplating sale or acquisition of a business needs to ensure they have access to an employment law specialist with particular expertise in TUPE issues.

#### **Failure to inform and consult**

As with the TUPE Regulations 1981, the 2006 Regulations impose the obligation on the transferee and transferor to consult and inform affected employees regarding a proposed transfer.

In Sweetin v Coral Racing, the Employment Appeal Tribunal held that when assessing compensation for failure to consult the tribunal should award the maximum 13 weeks' pay per affected employee unless there are mitigating circumstances justifying a departure from the maximum award.

#### *Comment*

Employers (and prospective employers) engaged in a transfer deal need to appreciate that such awards under the TUPE Regulations are meant to be punitive as opposed to compensatory. At 13 weeks pay per employee (with no cap on a week's pay), this can be a substantial penalty. What is more, whereas the liability used to rest solely with the transferee acquiring the business, the transferor can be made jointly and severally liable for the award.

Employers need to ensure that business sale agreements provide sufficient warranties and indemnities and take steps, so far as is reasonably practicable, to ensure the other party to a deal is complying with its consultation obligations.

**For further advice on any employment or human resources matter, please contact any member of the employment team:**

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