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THIS MONTH'S CONTRIBUTOR

Daniel Clarke

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Seminars & workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate

Employment Law Update - August 2013

Welcome to the next edition of 3 Hare Court's Employment Law Update. 3 Hare Court's employment practice group provides commercial and sensitive advice to employers, employees and employment agencies. In these monthly email updates we highlight recent developments in employment law and provide analysis on recent noteworthy cases.

In this month's update we look at 2 recent decisions on collective redundancy consultation (USDAW v Ethel Austin) and what constitutes an 'organised grouping of employees' for TUPE purposes (Ceva Freight (UK) Limited v Seawell).

Collective redundancy consultation

The much anticipated judgment of the EAT in USDAW v Ethel Austin (in administration) UKEAT 0548/12/KN (also known as USDAW v Woolworths) states that the current UK law on collective redundancy consultation does not comply with the relevant EU Directive. Accordingly, the EAT held that section 188 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRECA") is to be read purposively in order to give effect to it.

The case arose out of the mass redundancies by two businesses, Ethel Austin and Woolworths, which had gone into administration. Under section 188 TULRECA, where an employer is proposing to dismiss as redundant "20 or more employees at one establishment within a period of 90 days or less", there is a duty on the employer to consult all the appropriate representatives of any employees affected. Under section 189, failure by an employer to consult will result in a declaration and possibly a protective award, under which the employer must pay remuneration for the protected period.

The ETs found that there had been a failure to consult prior to making mass redundancies in both cases. Employees who had been employed at stores with more than 20 employees received a protective award. However, the ETs found that each of the stores constituted a separate 'establishment' within the meaning of TULRECA as they had physically distinct premises and a distinct purpose. Accordingly, it was held that

to contact our marketing manager, Carolyn Harris.

Conferences

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Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our marketing manager, Carolyn Harris with any queries.

Employment Law at 3 Hare Court

We regularly appear in the employment tribunals and EAT.

the employees who had been employed in stores with fewer than 20 employees were ineligible to receive a protective award.

USDAW appealed on the basis that TULRECA failed to comply with Directive 98/59 EC on collective redundancies and, in particular, its aim of affording greater protection to workers in event of such redundancies. Under the option chosen by the British Government, the wording of the Directive requires an employer to consult collectively where, over a period of 90 days, the number of redundancies is "at least 20, whatever the number of workers normally employed in the establishments in question".

The EAT allowed the appeal, holding that section 188 TULRECA was incompatible with the Directive. It held that the location where people work is irrelevant; rather, the focus is on the number of people to be dismissed as a whole, irrespective of whether the business of the employer is carried out over multiple sites. Section 188 TULRECA is to be interpreted purposively to give effect to the Directive, so that the words "at one establishment" should be deleted from section 188 as a matter of construction.

USDAW v Ethel Austin has significant implications for larger employers with multi-site businesses. The collective redundancy consultation obligation now arises when an employer proposes to dismiss 20 or more employees as redundant across its entire business as a whole. However, it should be noted that the Industrial Tribunal in Northern Ireland has since faced the same issue. The Industrial Tribunal has referred the question to the European Court of Justice.

What constitutes an 'organised grouping of employees' for TUPE?

Under regulation 3(3) TUPE, a service provision change can only take place when, immediately before the transfer, there is an "organised grouping of employees" situated in Great Britain which has as its principal purpose the carrying out of the relevant activities on behalf of the client. The Court of Session case of Ceva Freight (UK) Limited v Seawell Limited [2013] CSIH 59 provides useful guidance on the meaning of "an organised grouping of employees".

Mr Moffat was employed by Ceva as a logistics co-ordinator. Ceva's workforce was divided into 2 separate parts, one for "inbound" logistics and another for "outbound" logistics. Mr Moffat worked in the "outbound" group with 7 other employees. Seawell became a client of Ceva and Mr Moffat spent 100% of his time working on the Seawell account, while four other employees in the outbound group spent between 10% and 30% of their time on that account. When Seawell

Silks in chambers have experience of employment and discrimination issues in the High Court and Court of Appeal.

Members deal with a range of work from straightforward issues of unfair dismissal and redundancy to issues of equal opportunities, discrimination and human rights. This includes the seminal case of Bull & Bull v Hall & Preddy & Hall [2012] EWCA Civ 83 where the Court of Appeal determined whether it was discrimination not to provide goods and services on the grounds of sexual orientation.

Additionally, members regularly deal with the full range of discrimination claims under the Equality Act 2010 including direct and indirect discrimination, whistleblowing, victimisation and harassment in multi-day hearings for both Claimants and Respondents.

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subsequently brought the logistics work back in-house, Ceva argued that TUPE applied and that Mr Moffat had transferred to Seawell under a service provision change. Seawell disputed this, but Ceva nonetheless terminated Mr Moffat's employment. Mr Moffat brought claims of unfair dismissal against Ceva and Seawell.

The EAT had found that Mr Moffatt had been unfairly dismissed by Ceva on the basis that the only deliberately organised grouping within Ceva were groupings into the "inbound" and "outbound" parts of the company's operation. The other employees in the outbound group spent limited time on the Seawell contract, so it was not organised for the purposes of working for Seawell. It was not sufficient to satisfy regulation 3(3) that Mr Moffat had spent all his time on Seawell's work.

The Court of Session upheld the EAT's decision. It held that the concept of an organised grouping under regulation 3(3) "implies that there be an element of conscious organisation by the employer of his employees into a grouping – of the nature of a team – which has as its principal purpose the carrying out de facto of the activities in issue". It further held that where a number of employees carried out activities for a client through collaboration to varying degrees, it was not legitimate to isolate one of those employees on the basis that he devoted all of his working time to assisting in that collaborative effort.

It should be noted that the Government's proposed reforms to TUPE include the removal of the service provision change provisions. Until such reforms come into force, however, Ceva Freight is an important decision that narrows the circumstances under which a service provision change transfer can take place.

Legislative Changes

The next edition of 3 Hare Court's Employment Law Update is due out in September 2013. Until then!

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Chambers of Peter Knox QC

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3 Hare Court
Temple
London EC4Y 7BJ
DX 212
T: 020 7415 7800