

## Redundancies Following a TUPE Transfer

When one business has acquired another similar business under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the need for redundancies often arises. In *First Scottish Searching Services Ltd. v McDine and Middleton*, the judgment of the Employment Appeal Tribunal (EAT) illustrates what approach the Employment Tribunal (ET) should adopt when deciding what constitutes a fair redundancy selection process when the selection pool includes employees of the transferor and the transferee.

First Scottish Searching Services Ltd. (FSSS) had acquired another property title search business, SPH, in 2009. The contracts of employment of employees of SPH were automatically transferred to FSSS in the TUPE transfer. FSSS had warned that redundancies would be likely and, in the event, used the same scoring matrix as it had adopted during an earlier round of redundancies in 2008. Former employees of SPH were assessed by managers who had transferred with them, whilst the scoring for existing FSSS employees was carried out by managers familiar with their work. The scores of the latter group were also compared with those achieved in the 2008 redundancy exercise. As it turned out, all of the employees identified as being at risk of redundancy had transferred from SPH.

Two of the dismissed employees contended that the redundancy exercise was biased and brought claims for unfair dismissal.

The ET criticised the redundancy selection system used by FSSS because it did not incorporate 'some system for moderating the two sets of scores'. In its view, because there was a 'clear and overt risk of unfairness', the entire redundancy process was unfair. FSSS appealed against this decision.

The EAT upheld the appeal. The ET had failed to give any explanation of what it meant by 'moderating' the scores nor, indeed, how moderation came to be a feature of the case at all. There were no findings of fact as to what might actually have been done to achieve whatever it was the ET had in mind nor as to what would have

been the likely outcome if 'some system of moderation' had been employed.

Under Section 98 of the Employment Rights Act 1996 (ERA), whether a redundancy dismissal is fair or unfair depends on whether the employer acted reasonably or unreasonably in deciding to dismiss the employee. In many cases, there will be a band of reasonable responses, with room for legitimate differences of opinion amongst reasonable employers as to what is a fair way to act. Case law establishes that it will rarely be appropriate for an ET to perform a detailed scrutiny of the scoring system or the application of the system in a particular case.

The ET had fallen into the trap of engaging in a 'microscopic' and 'over minute' reassessment of the redundancy selection process and had substituted its own opinion for that of a reasonable employer. It had sought perfection when this is not what is required by the ERA. There was no finding of fact as to any inconsistency of approach between the two sets of managers and no evidence of deliberate bias. Furthermore, the ET had failed to consider the impact on the redundancy decision of the claimants' scores for length of service – a wholly objective criterion that no amount of moderation could have affected – which was clearly substantial.

**We can advise you on any redundancy matter.**



## Polkey Reductions – Some Speculation Inevitable



In *Eversheds Legal Services Ltd. v de Belin*, whilst upholding Mr de Belin's claims of unfair dismissal and sex discrimination, the Employment Appeal Tribunal (EAT) found that the Employment Tribunal (ET) had failed to address Eversheds' argument that the amount of the compensation award should have been discounted in order to reflect the possibility that the claimant would have been dismissed as a result of a subsequent redundancy exercise a year later. This is commonly known as a 'Polkey' reduction as this point was first established in the case of *Polkey v A E Dayton Services Ltd.*

Eversheds had produced evidence to show that, had he not already been made redundant, Mr de Belin would probably have been selected based on the criteria used in the later

redundancy exercise. The ET dismissed the argument, describing the evidence as 'speculative' and insufficient for it to carry out a Polkey exercise.

The EAT held that this reasoning was 'plainly unsatisfactory'. The ET had a duty, as part of its obligation to give reasons for its decision, to consider the evidence rather than dismiss it. In the EAT's view, the ET was 'seduced into abandoning its proper course, as tribunals still too often are, by the siren word "speculative"'. Although earlier case law warns against engaging in speculation, this caution should not be interpreted too widely. The authorities also state that any assessment of future loss will inevitably involve a speculative element. In assessing how long an employee would have been employed but for the dismissal, it is for the employer to adduce any relevant evidence on which it wishes to rely. When making its assessment, the ET must have regard to all the evidence presented. Whilst there will be circumstances where the evidence is such that no sensible prediction can be made, the ET has a duty to take account of any material that will assist it in determining a compensation award that is fair. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for failing to evaluate the evidence.

In the circumstances, there was clearly a case to answer and the question of compensation was remitted to a different ET for proper consideration.

## New Minimum Wage Rates

The Government has announced that it has accepted the recommendations of the Low Pay Commission (LPC) on new rates for the National Minimum Wage (NMW) that will come into force on 1 October 2011.

The revised rates are as follows:

- The adult hourly rate of the NMW will increase from £5.93 to £6.08;
- The development rate (which covers workers aged 18-20 years) will increase from £4.92 to £4.98; and
- The rate for workers aged 16 and 17 will increase from £3.64 to £3.68.

The apprentice rate, for apprentices under 19 or those aged 19 or over and in the first year of their apprenticeship, will increase from £2.50 to £2.60 per hour.

From 1 October 2011, the accommodation offset will rise from £4.61 per day to £4.73.

The LPC reports that there is continuing evidence of breaches of the NMW Regulations with regard to young people doing work experience and recommends that

stronger enforcement action should be taken. This should be accompanied by better understanding of when a legitimate unpaid work experience opportunity becomes a work placement that should be paid at least the NMW. Accordingly, it recommends that the Government takes steps to raise awareness of the rules applying to payment of the NMW for those undertaking internships, all other forms of work experience and volunteering opportunities, and that these rules are effectively enforced by HM Revenue and Customs using its investigative powers.



## Modern Workplaces Consultation

The Government has launched a further consultation as part of its comprehensive review of employment law. This encompasses the following areas:

### Flexible Parental Leave

Under the proposals, from 2015 mothers would be entitled to 18 weeks' maternity leave and pay, taken in one continuous block, around the time of their child's birth. The father's current right to take 2 weeks' paid paternity leave around the time of the baby's birth would be retained. Once the early weeks of maternity and paternity leave have ended, parents would be able to share 30 weeks of additional parental leave, of which 17 weeks would be paid. Unlike the current system, this leave could be divided into blocks between the parents, with both parents able to take leave at the same time should they wish. Employers would, however, have the ability to ensure that the leave is taken in one continuous period if agreement cannot be reached. They would also be able to ask staff to return for short periods to meet peaks in demand or to require that leave be taken in one continuous block, depending on business needs. In addition, there would be four weeks of parental leave and pay available to each parent, to be taken in the child's first year;

### Flexible Working

The right to request flexible working would be extended to all workers who have been with their employer for 26 weeks. Currently, it applies only to parents of children aged 17 and under (18 and under where the child is disabled) and employees who care for, or expect to care for, certain adults. To achieve this, the system for considering flexible working requests would be made more adaptable, with the

statutory process replaced with a new duty on employers simply to consider requests 'reasonably'. A statutory Code of Practice would be published, setting out best practice on the benefits and adoption of flexible working, including guidance on what is a 'reasonable' process for handling requests. It is proposed that employers should be allowed to take into account employees' individual circumstances when considering conflicting requests. There are no plans to alter the current eight business reasons for a business to turn down a request;

### Equal Pay

It is proposed that where an Employment Tribunal (ET) finds that an employer has discriminated on the ground of gender in relation to pay, the ET would have the power to order the employer to conduct a pay audit and publish the results; and

### The Working Time Regulations

Amendments would be made to the Working Time Regulations 1998, including a tidying-up exercise to bring them into line with recent judgments in the European Courts, so that annual leave entitlements can be rescheduled, and carried over to the next leave year if necessary, when a worker falls ill during planned annual leave. The proposal is to limit this to the four weeks' minimum annual leave entitlement under the EC Working Time Directive.

The consultation document can be found at <http://www.bis.gov.uk/modernworkplaces>. The consultation closes on 8 August 2011.

## Disability Discrimination – Failure to Make Reasonable Adjustments

Under Section 4A of the Disability Discrimination Act 1995 (DDA), employers had a duty to make reasonable adjustments to working practices in order to ensure that a disabled employee was not disadvantaged. Under the Equality Act 2010, which has now replaced the DDA, this duty remains largely the same.

In a recent case (*Tameside Hospital NHS Foundation Trust v Mylott*), the Employment Appeal Tribunal (EAT) held that an employer's failure to take steps to facilitate a disabled employee's application for ill health retirement was not a breach of Section 4A of the DDA. Whilst upholding other findings of disability discrimination against the Tameside Hospital NHS Foundation Trust, which related to its handling of Mr Mylott's situation when he was absent from work for a long period with work-related stress, the EAT overturned this aspect of the judgment of the Employment Tribunal. In the EAT's view, the duty under Section 4A did not extend to enabling a disabled employee who was no longer able to do their work (or any available alternative) to leave their employment on favourable terms. The whole concept of an adjustment is that it is made in order to make it possible for the disabled employee to remain in employment. It does not extend to



taking steps to ensure that they are compensated for no longer being able to do so.

**Whilst this decision clarifies the scope of an employer's duty to make reasonable adjustments for a disabled employee, long-term sickness absence is a difficult area of the law and we strongly recommend that you take advice based on your specific circumstances before taking any action.**

The Department for Business, Innovation and Skills (BIS) has published guidance on the Agency Workers Regulations 2010 (AWR) for employers and those in the recruitment sector.

The AWR, which implement the EU Agency Workers Directive, are scheduled to come into force on 1 October 2011. They give agency workers the right to the same basic terms and conditions of employment as if they had been recruited directly by the hirer, once they have completed a qualifying period of 12 calendar weeks in a particular job, but will not fundamentally affect their employment status or how agency staff are placed and managed.

Under the AWR, if you hire agency workers, from day one of their assignment you must ensure that they are treated no less favourably with regard to access to workplace facilities (for example a canteen, workplace crèche, mother and baby room, prayer room, car parking etc.) than an employee or worker who is employed by you directly. In addition, agency workers will have the right to be provided with information about any relevant job vacancies within the organisation that would be available to a comparable employee or worker.

After 12 weeks in the same job, an agency worker will be entitled to equal treatment with regard to key elements of pay, duration of working time, night work, rest periods, rest breaks, annual leave and paid time off for antenatal medical appointments and classes. The AWR do not,

however, give agency workers any additional entitlement to maternity, paternity or adoption rights beyond those to which they would otherwise have been entitled. The qualifying period is not retrospective. An agency worker will only start to accrue the 12 weeks' qualifying period after the AWR come into force, even if the assignment commenced prior to that date.

The 50-page guidance includes information on how the 12-week qualifying period is calculated and is available on the BIS website at <http://www.bis.gov.uk>.

**Employers are advised to consider how the AWR will affect them and have the necessary procedures in place by 1 October 2011 to ensure compliance. Contact us for individual advice.**



**Shrewsbury Office:** Chapter House North, Abbey Lawn, Abbey Foregate, Shrewsbury, SY2 5DE  
Tel: 01743 280280 Fax: 01743 282340 DX: 144320

**Hereford Office:** 11 King Street, Hereford, HR4 9BW  
Tel: 01432 378379 Fax: 01432 378383 DX: 17255 Hereford

**Ludlow Office:** 12 The Business Quarter, Eco Park Road, Ludlow, SY8 1FD  
Tel: 01584 872333 Fax: 01584 876459 DX: 26883 Ludlow 1

**Oswestry Office:** 39 - 41 Church Street, Oswestry SY11 2SZ  
Tel: 01691 652241 Fax: 01691 6670074 DX: 26603 Oswestry

**Oswestry Residential Property Office:** 35 Church Street, Oswestry SY11 2SZ  
Tel: 01691 656777 Fax: 01691 670471 DX: 26603

**Telford Office:** Brodie House, Central Square, Telford Town Centre, TF3 4DR  
Tel: 01952 291222 Fax: 01952 292585 DX: 28071

**Wellington Office:** 49 Church Street, Wellington, Telford, TF1 1DA  
Tel: 01952 244721 Fax: 01952 222418 DX: 23101

**Email:** [info@lblaw.co.uk](mailto:info@lblaw.co.uk) [www.lblaw.co.uk](http://www.lblaw.co.uk)

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