Cox Cooper Ltd
Solicitors

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Your quarterly bulletin on legal news and views from Cox Cooper Solicitors

Employment Law UPDATE

TUPE – No Service Provision Change to Commercial Bus Company

In a recent case *(CT Plus (Yorkshire) CIC v Black and Others)*, the Employment Appeal Tribunal (EAT) provided important guidance on the operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) with regard to the service provision change (SPC) provisions. Regulation 3(1)(b)(ii) states that TUPE applies when activities cease to be carried out by a contractor on a client's behalf and are carried out instead by another person on the client's behalf. The EAT stressed that in this context 'client' means 'an organisation that is in a position to carry out activities either itself or by commissioning them from others to carry out those activities on its behalf'. It is central to all three forms of SPC identified in TUPE that there should be a client or group of clients for whom the service is performed.

CT Plus Limited, a community interest company owned by a charity, had successfully tendered to operate a park-and-ride bus service from a council-owned car park on the western outskirts of Hull to the city centre. The company received a substantial subsidy from Hull City Council to offset the costs of running the service, which operated to a timetable set by the Council. Under the terms of the contract, the Council also had control over the type and age of the buses to be used and their branding.

Stagecoach, which is a much bigger operation than CT Plus, with an extensive depot in Lincoln, decided that it could operate the service profitably, without subsidy, albeit with a reduced service outside peak hours. It therefore gave notice of its intention to the relevant government agency. Since a subsidised service of the kind CT Plus had agreed with the Council cannot be run in competition with a commercial service, its contract was terminated.

Stagecoach declined to take on CT Plus's drivers, arguing that there was no SPC under TUPE. CT Plus disagreed and proceedings were brought before an Employment Tribunal (ET) in order to establish whether there had been a TUPE transfer and who should

compensate the employees who had lost their jobs. The ET ruled in Stagecoach's favour.

In ruling on CT Plus's challenge to that decision, the EAT acknowledged that Stagecoach had both a legal and practical relationship with the Council. It paid a monthly sum for use of facilities at the park-and-ride hub and liaised with the Council in respect of a range of matters connected to the service.

However, the EAT noted that Stagecoach used its own buses and drivers. It was performing the service as a commercial venture, for its own benefit, and was not acting on behalf of the Council, which could not be viewed as its client, being no more than an 'interested bystander'. The provisions of TUPE had been applied by the ET in a commonsense and pragmatic manner, without error of law. The appeal was therefore dismissed.

If you are involved in the transfer of a business or expect to lose or secure a contract for service provision, contact us for advice.

Compensation-Seeking Job Applicant Cannot Rely on Protection from Discrimination

In *Kratzer v R+V Allgemeine Versicherung AG*, the Court of Justice of the European Union (CJEU) has ruled that a German man who applied for a job with the essential aim of not taking up the post but of seeking compensation for discrimination was not entitled to the protection afforded by EU Directive 2000/78 (the Equal Treatment Directive) and the related Directive 2006/54 (on equal opportunities and equal treatment of men and women in matters of employment and occupation).

In March 2009, Nils-Johannes Kratzer replied to a job advertisement for a graduate trainee position with R+V Allgemeine Versicherung AG (R+V), which provides reinsurance services worldwide. He emphasised that not only did he fulfil the criteria set out in the advertisement but he also had extensive management experience in the insurance industry. His application was unsuccessful. Herr Kratzer then sent a written complaint to R+V demanding 14,000 euros in compensation for age discrimination.

R+V replied to Herr Kratzer inviting him to attend an interview with its head of human resources and stating that its rejection of his application had been automatically generated and was not in line with its intentions. He declined the invitation and suggested instead a discussion of his future with the company once his compensation claim had been settled.

When the company failed to accede to his request, Herr Kratzer proceeded to bring a claim of age discrimination. When he discovered that R+V had awarded the four trainee posts to women, although the more than 60 applicants were divided almost equally between men and women, he claimed a further sum of 3,500 euros in compensation for sex discrimination. His case was twice dismissed. When he appealed to the German Federal Labour Court, the Court decided to stay proceedings and refer to the CJEU for a ruling on whether a person who is not seeking to obtain the post advertised but only the formal status of applicant, with the sole purpose of claiming compensation, qualifies for protection under the Directives.

The CJEU ruled that the objective of the Directives is to ensure equal treatment 'in employment and occupation' by offering protection against certain forms of discrimination, in particular concerning 'access to employment'. A person in Herr Kratzer's situation does not fall within the definition of someone seeking 'access to employment, to self-employment or to occupation' and cannot be regarded as a 'victim' for the purposes of the Directives or as someone who has suffered 'loss' or 'damage'. Such a job applicant cannot, therefore, benefit from the protection afforded by the Directives.

Ideally, in order to ensure that job applications are dealt with fairly and without discrimination, the process of identifying which applicants best meet the needs of the job description and the person specification should be carried out by two or more people, so that it is as objective as possible. If you are faced with a vexatious applicant, contact us for advice on how to proceed.

New Minimum Wage Rates

The following changes to the National Minimum Wage (NMW) rates for workers aged under 25 came into effect on 1 October 2016:

- The NMW rate for workers aged 21 to 24 increased from £6.70 to £6.95 per hour;
- The NMW rate for workers aged 18 to 20 increased from £5.30 to £5.55 per hour;
- The NMW rate for 16- and 17-year-olds increased from £3.87 to £4.00 per hour; and
- The apprentice rate of the NMW, which applies to apprentices aged under 19 or 19 or over and in the first year of their apprenticeship, increased from £3.30 to £3.40 per hour.

The hourly rate of the National Living Wage, which was introduced on 1 April 2016 and is payable to workers aged 25 and over, remains unchanged at £7.20 per hour.

Disability Discrimination – Failure to Make Reasonable Adjustments

A nursing home worker who found heavy lifting difficult due to a heart condition has won the right to substantial compensation after her employer failed to comply with its duty under the Equality Act 2010 to make reasonable adjustments to cater for her disability *(Lowmoore Nursing Home Limited v Smith)*.

Ms Smith was employed by Lowmoore Nursing Home Limited from February 2006 until her resignation in January 2014, latterly as a care worker. She suffers from periodic bouts of cardiac arrhythmia and complained after she was transferred from a unit where she was caring for people with challenging behavioural issues to one where many of the residents were immobile and required lifting. She tried to resist the move and produced a letter from her doctor confirming that she suffers from exertional breathlessness and paroxysmal tachycardia, which can be exacerbated by heavy lifting. Her manager, Ms Taft, did not recognise that her condition was a disability and turned down Ms Smith's request for a meeting so that she could provide further information regarding her capabilities. After carrying out an informal risk assessment that failed to assess Ms Smith's medical condition and the respective working conditions in the different units, Ms Taft informed her that the transfer was to go ahead as planned.

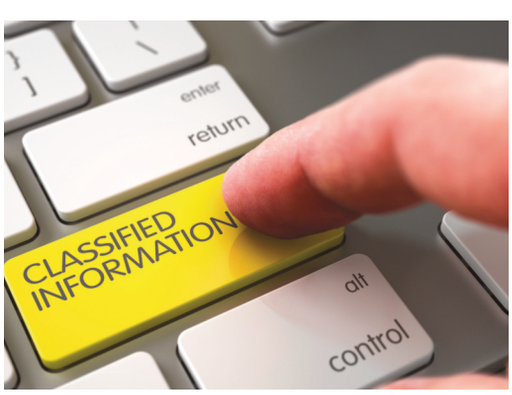
Ms Smith went on sick leave and raised a grievance. This was rejected and she was informed that she must either return to work or resign. She chose the latter option.

An Employment Tribunal (ET) subsequently found that Ms Smith's employer had failed in its duty under the Equality Act to make reasonable adjustments so that she could be excused from heavy lifting work. Ms Taft could have reviewed the rotas and agreed to her request to work in a different unit. In also upholding her claim of constructive unfair dismissal, the ET found that her treatment amounted to a fundamental breach of contract.

In dismissing Lowmoore Nursing Home's challenge to those decisions, the Employment Appeal Tribunal rejected arguments that the ET had wrongly dealt with the complaint as if it were related to general physical exertion, rather than heavy lifting specifically. Ms Smith's employer had breached the implied duty of trust and confidence that it owed her and she bore none of the blame for that. The amount of her compensation remains to be assessed.

We can advise you on any discrimination law matter.

IT Salesman Who Betrayed Employer's Trust Pays the Price



Many people dream of leaving their job and setting up their own business – but it is vital to remember your former employer's rights when doing so. In a recent case, an IT salesman who misused confidential information to give his new venture a head start was financially ruined by a High Court ruling *(Decorus Limited v Penfold and Another)*.

Daniel Penfold commenced employment with Decorus Limited as a sales account manager in April 2012 and left on 8 February 2016 to set up his own business.

Prior to resigning from his post, he viewed client lists and sensitive pricing information on his employer's database and diverted orders from an important customer to his new and competing venture. Following his departure, he made use of the confidential information in seeking to establish his business and the Court found that those actions amounted to a clear breach of the duties of confidence and fidelity that he owed his employer.

He had also taken steps to solicit Decorus clients with whom he had dealt. This was in breach of restrictive covenants contained within his employment contract, which the Court found to be reasonable and enforceable.

The Court ordered him to pay £29,852 in damages to his employer and the estimated £80,000 legal costs of the case. His lawyers said that he would be financially wiped out by the decision.

We can advise you on drafting restrictive covenants that will both protect your legitimate business interests and also be viewed as a reasonable restriction with regard to the individual nature of your business.

The Use of E-cigarettes in the Workplace

Legislation under the Health Act 2006 that prohibits smoking in enclosed public places and workplaces, on public transport and in vehicles used for work does not cover the use of e-cigarettes. The devices do not burn tobacco or create smoke but work by vaporising a flavoured liquid for the user to inhale, which is why their use is referred to as 'vaping'.

While debate continues about the absolute level of safety of e-cigarettes, the consensus across England's public health community is that they are significantly safer for users than smoked tobacco. Nor is there any evidence so far of harm caused by second-hand e-cigarette vapour.

Approximately 2.8 million adults in Great Britain currently use e-cigarettes, almost all of whom are smokers or ex-smokers. Public Health England (PHE) has now published guidance setting out the key principles that should guide policy making on the use of e-cigarettes in public places and in the workplace. The framework is aimed at helping employers create policies that will support smokers trying to give up the habit whilst managing any risks specific to their setting. Clearly, there is no 'one-size-fits-all' approach as working environments vary. For example, a factory or warehouse is a very different setting from a nursery school, so a different approach will be appropriate in each case.

The five key principles are:

1. Make clear the distinction between vaping and smoking;
2. Ensure policies are informed by the latest evidence on health risks to bystanders;

3. Identify and manage risks of uptake by children and young people;
4. Support smokers to stop smoking and stay smoke free; and
5. Support compliance with smoke-free law and policies.

Under each heading, the guidance provides considerations to enable employers to produce a policy that is suited to their particular working environment.

PHE is committed to continuing to monitor the evidence on e-cigarette use and to communicating its findings so that members of the public and policy makers have the knowledge they need to make informed decisions.

The guidance can be found at http://bit.ly/29zkScX .

Contact us for advice on any employment law matter.

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