

February 2009

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Features

Pensions: Some future trends

Introduction

In November 2008, we conducted a mini survey amongst visitors to the Professional Pensions Show at London's ExCel centre. The survey touched on attitudes to the introduction of automatic enrolment and on the issues of conflicts of interest and corporate governance in the light of the prevailing economic climate. The results of the survey are set out in the appendix and the implications of some of the survey's results are examined in more detail below.

Automatic enrolment

Automatic enrolment, which is expected to be introduced in 2012, will require employers to ensure that employees become members either of the statutory personal accounts scheme or of a suitable occupational scheme and to pay employer contributions at a certain minimum level.

Our survey made two statements about the potential effects of automatic enrolment and asked those completing the survey to specify the extent to which they agreed or disagreed with the statements. The statements made were:-

- the introduction of auto-enrolment will result in changes to occupational scheme design;
- in most cases, changes made to scheme design as a consequence of auto-enrolment, will lead to a reduction in the level of benefits provided.

Unsurprisingly, the majority of those surveyed either agreed or strongly agreed with the first statement, although there were a minority that disagreed – particularly scheme trustees. However, the second statement produced a wider divergence of opinion. Again, the majority agreed or strongly agreed with the statement, but a sizeable minority either disagreed or strongly disagreed. For example, 37% of those who described themselves as representing scheme employers disagreed that the changes made to scheme design would, in most cases, lead to a reduction in benefit levels.

It has been widely suggested that employers will seize upon the introduction of automatic enrolment as a justification for reducing future service benefits. The Government's view on this, as explained by Rosie Winterton MP at the National Association of Pension Funds (NAPF) Trustee Conference on 28 November 2008, is that there are sufficient safeguards in place under the personal accounts regime to protect against this happening – in particular the ban on transfers between existing pension schemes and personal accounts, the £3,600 annual limit on contributions and a qualifying scheme test that can be relatively easily satisfied.

Certainly our survey suggests that employers are not necessarily regarding automatic enrolment as an opportunity to reduce future service benefits to the minimum level needed in order for an occupational scheme to be a "qualifying scheme". Briefly, a qualifying scheme¹ for this purpose is:-

- a contracted-out defined benefits scheme; or
- a contracted-in defined benefits scheme which provides a pension from age 65 which is broadly equivalent to or better than a pension of 1/120th of average "qualifying earnings" for the last three years (qualifying earnings are gross annual earnings between £5,035 and £33,450. These limits will be reviewed each year);
- a defined contribution scheme under which the employer contribution is at least 3% of an active member's qualifying earnings and the total employer and compulsory member contribution is at least 8% of qualifying earnings.²

Where a scheme is a "qualifying scheme", an employer would not be required to automatically enrol employees into personal accounts.

¹ These requirements will be phased in over a transitional period. For example, the total compulsory contribution to defined contribution schemes, will be 2% initially and then 5% before rising to 8%.

² Hybrid schemes will be required to satisfy either the defined benefit or the defined contribution qualifying scheme test. The test to be satisfied will be determined in accordance with regulations.

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So, our survey indicates that the link between automatic enrolment and occupational scheme design may not be as direct as some commentators have suggested. In practice, the prevailing economic climate is likely to have a greater impact on occupational pension provision and this is borne out by the response to the third statement in our survey:-

- the current economic climate will result in sponsoring employers taking further steps to reduce their occupational pension liabilities.

85% of those with defined benefit arrangements either agreed or strongly agreed with this statement. Of those who described themselves as representing the sponsoring employer, 69% agreed or agreed strongly with this statement. The percentage was even greater amongst trustees – namely, 84%.

We are mindful that the economic position has deteriorated further since our survey was conducted. The recent NAPF paper on the economic crisis³ demonstrates a significant change in attitude amongst employers between July 2008 and January 2009, with a doubling in the numbers of those with open defined benefit schemes who are expecting to switch their new employees to occupational or contract-based defined contribution arrangements. Similarly, the NAPF has found that the percentage expecting to keep their current defined benefits scheme open, but to make changes to reduce employer risk and/or costs, is up from 10% in July 2008 to 14% in January 2009. These changes could include measures such as offering inducements to members to transfer out, reducing future service accrual rates, introducing career-average benefits for future service, changing investment strategy and merging schemes to achieve cost savings.

Of course, changing occupational scheme benefits is not necessarily that straightforward. Trustee consent will be required in most cases and there are statutory consultation obligations to fulfil, which will necessitate an employer consulting (for a minimum period of 60 days) with employees affected by certain planned changes. This is against the background of the Department of Work and Pensions consultation on proposals for the Pensions Regulator to be able to issue fines for breaches of the consultation requirements.

Whilst much has been made of the risk of occupational scheme benefits being levelled down as a result of the introduction of personal accounts, there has been less comment on the significant communication and education challenges that must be met if automatic enrolment is to achieve its stated aim of helping those on low and moderate incomes to save for their retirement. The recent report on awareness, knowledge and attitudes regarding the retirement process⁴ identified a widespread lack of understanding of and interest in pensions. To quote from the report. *"Feelings about pensions fell into two types; indifference to detail and the future; and cynicism and lack of confidence that the pension will be worth anything"*.

Instilling confidence in the target audience and an appreciation of the importance of adequate saving for retirement is critical, but this will be a hard nut to crack and the track record is not encouraging. It had been hoped that stakeholder schemes would go some way towards achieving but they have failed to do so. Also, our experience and anecdotal evidence suggest that many employers with good occupational schemes have found themselves unable to change the culture of mistrust and apathy that can so often exist amongst members and potential members. This is notwithstanding expensive and sophisticated communication exercises.

Ultimately, the success of personal accounts cannot be properly assessed until the low and moderate income earners who are currently in their 20s and 30s retire. It is their living standards in retirement that will be the acid test of the success or otherwise of automatic enrolment.

Conflicts of interest

Our survey also asked whether respondents thought that the current economic climate would increase the likelihood of conflicts arising for scheme trustees. 88% of employer respondents and 82% of trustees either agreed or strongly agreed with this statement. Of the small minority that disagreed in each case, a number commented that these conflicts exist already - in particular as a consequence of the requirements of the scheme specific funding regime and in the light of widespread pension deficits.

However, with the trading environment becoming increasingly difficult for many sponsoring employers, there would seem to be a greater risk of trustees finding themselves in positions of conflict. For example, we would expect to

³ Pension Provision and the Economic Crisis NAPF, January 2009.

⁴ Awareness, knowledge and attitudes regarding the retirement process for PADA's target audience by Craig Ross Davison, August 2008.

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see many employers wishing to re-negotiate recovery plans where previously - agreed contribution levels now pose a threat to the future development and/or solvency of an employer's business. Indeed, this is recognised by the Pensions Regulator's October 2008 statement regarding current financial pressures.⁵ Such a situation could raise particularly tricky conflicts for trustees who are employed by the sponsoring employer and who have a clear interest in ensuring the employer's continuation – especially in circumstances where the scheme could potentially qualify for Pension Protection Fund entry, were the employer to become insolvent. Also, many employers may find it necessary to re-structure their businesses, raising potentially difficult issues for trustees regarding the strength of the employer covenant and possibly necessitating applications for clearance to the Pensions Regulator.⁶

In the circumstances, trustees must ensure that they have adequate procedures in place for identifying and managing conflicts of interest. The Regulator's Guidance is particularly helpful in identifying the practical steps that may need to be taken. For schemes having a corporate trustee, it is important to consider the implications of the new statutory duty on directors to avoid actual and potential conflicts of interest and, where appropriate, to take steps to authorise conflicts.

Corporate governance

Our final question related to corporate governance. The survey invited respondents to agree or disagree with the following statement:-

- in the current economic climate it is particularly important for trustees to pay attention to corporate governance issues.
- No respondents disagreed with this statement and only a minority were undecided. 100% of employers and 93% of trustees either agreed or strongly agreed with this statement.

Our survey followed hard on the heels of the publication, in October 2008, of the Government's response to the consultation on its proposals to update the Myners principles and to continue to improve pension fund investment decision-making and governance.⁷ The Myners principles, which were introduced in 2002, codify best practice for scheme trustees in investment decision-making. Although the principles are voluntary, trustees are expected to consider their applicability and report, in their Statement of Investment Principles, on the extent to which they have adopted the principles.

However, the environment in which pension schemes are now operating is very different from that which prevailed when the Myners principles were first introduced. Not only has there been a marked shift from defined benefit to defined contribution provision, there has also been a shift from defined benefit surpluses to deficits, bringing with it a need for trustees to understand more complex deficit-correction investment models. Following a review in 2004 of the extent to which the principles were being applied and a further review by the NAPF in 2007⁸ and in the light of the responses to its consultation, the Government has proposed the following:

- a set of revised Myners principles which are higher level and more flexible than the original principles;
- higher quality, more selective and more accessible guidance and trustee tools;
- a more robust approach to expecting trustees to disclose whether they comply and to explain, if relevant, why they do not (although compliance with the principles will remain voluntary);
- the establishment of an Investment Governance Group, chaired by the Pensions Regulator, which will have overall responsibility for this area of investment decision-making and governance.

As with the original principles, the revised principles stress the concept of responsible ownership – i.e. trustees understanding and acting upon their responsibilities as shareholders in the companies in which they invest. The revised principles recommend that trustees should adopt, or ensure that their investment managers adopt, the Institutional Shareholders Committee Statement of Principles on the Responsibilities of Institutional Shareholders and Agents.⁹ A statement of the scheme's policy on responsible ownership should be included in the Statement of Investment Principles and trustees should report periodically to members on the discharge of such responsibilities.

⁵ The Pensions Regulator Statement to Trustees about Current Financial Pressures, October 2008.

⁶ The Pensions Regulator Guidance: Conflicts of Interest October 2008.

⁷ Updating the Myners principles; a response to consultation, October 2008.

⁸ Institutional Investment in the UK Six Years on, January 2007.

⁹ Updated September 2005.

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Although the original principles similarly emphasised responsible ownership, the prevailing economic climate makes it more important than ever for trustees to ensure not only that they fully embrace the concept of responsible ownership but also that they are able to demonstrate that they do so. One aspect of this which is likely to become more prominent, is the need for trustees to be alert to the possibility of benefiting from class actions against companies in which they have invested. Such class actions are a particular feature of the US litigation system since, in the largely unregulated US corporate and securities arena, they provide an effective means of enabling investors to hold companies to account.

A characteristic of US-style class actions (unlike, in particular, UK class actions) is that a court judgement or court-approved settlement will apply to every investor who has suffered loss as a result of the action complained of – whether or not that investor participated in the litigation. The only qualifying condition is that the investor must file a claim.

However, in order to file a claim, an investor must be aware of the action. This requires regular monitoring of pending and settled class actions. In some cases investment managers may be able to provide this service, otherwise there are various specialist portfolio monitoring services which will do this – many of them offered by US law firms.

Conclusions

Although only a small sample, our survey captured the prevailing mood that occupational pension provision is becoming increasingly burdensome for employers and trustees. The Government acknowledges this and has indicated that it is keen to support sponsoring employers. We wait to see whether this will translate into the kind of bold action that is needed to relieve the considerable pressures on occupational schemes.

By Carolyn Saunders

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APPENDIX

The Introduction of Auto-enrolment will result in changes to occupational scheme design

Status	Strongly Agree	Agree	Neither Agree nor disagree	Disagree	Strongly disagree
Scheme Type					
Defined Benefit	25%	50%	16%	9%	
Defined Contribution	29%	53%	10%	8%	
Hybrid	28%	56%	9%	7%	
Personal Pension/GPP	39%	46%	12%	3%	
Stakeholder	35%	50%	11%	4%	
Capacity					
Employer	31%	56%	13%		
Trustee	21%	48%	14%	17%	
Administrator	28%	60%	8%	4%	
Professional Adviser	26%	50%	15%	9%	
Other	27%	50%	13%	10%	

In most cases, changes made to scheme design as a consequence of auto-enrolment will lead to a reduction in the level of benefits provided

Status	Strongly Agree	Agree	Neither Agree nor disagree	Disagree	Strongly disagree
Scheme Type					
Defined Benefit	7%	49%	17%	27%	
Defined Contribution	5%	46%	18%	28%	3%
Hybrid	5%	56%	17%	20%	2%
Personal Pension/GPP	12%	45%	12%	20%	3%
Stakeholder	4%	53%	18%	25%	
Capacity					
Employer	13%	44%	6%	37%	
Trustee	4%	53%	27%	13%	3%
Administrator	9%	36%	23%	27%	5%
Professional Adviser	9%	48%	15%	27%	1%
Other	4%	59%	15%	22%	

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The current economic climate will result in sponsoring employers taking further steps to reduce their occupational pension liabilities

Status	Strongly Agree	Agree	Neither Agree nor disagree	Disagree	Strongly disagree
Scheme Type					
Defined Benefit	23%	62%	8%	7%	
Defined Contribution	24%	61%	13%	1%	1%
Hybrid	21%	64%	12%	3%	
Personal Pension/GPP	29%	54%	17%		
Stakeholder	22%	63%	15%		
Capacity					
Employer	19%	50%	19%	12%	
Trustee	23%	61%	6%	7%	3%
Administrator	28%	56%	12%	4%	
Professional Adviser	29%	56%	12%	3%	
Other	17%	70%	10%	3%	

The current economic climate increases the likelihood of conflicts of interest arising for scheme trustees

Status	Strongly Agree	Agree	Neither Agree nor disagree	Disagree	Strongly disagree
Scheme Type					
Defined Benefit	19%	52%	18%	11%	
Defined Contribution	14%	53%	21%	12%	1%
Hybrid	20%	50%	20%	10%	
Personal Pension/GPP	14%	46%	26%	14%	
Stakeholder	12%	46%	27%	15%	
Capacity					
Employer	7%	81%	6%	6%	
Trustee	18%	64%	11%	7%	
Administrator	16%	48%	28%	8%	
Professional Adviser	12%	47%	26%	15%	
Other	20%	53%	17%	10%	

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In the current economic climate, it is particularly important for trustees to pay attention to corporate governance issues

Status	Strongly Agree	Agree	Neither Agree nor disagree	Disagree	Strongly disagree
Scheme Type					
Defined Benefit	56%	40%	3%	1%	
Defined Contribution	62%	38%			
Hybrid	60%	36%	2%	2%	
Personal Pension/GPP	55%	39%	3%	3%	
Stakeholder	52%	44%		4%	
Capacity					
Employer	60%	40%			
Trustee	45%	48%	7%		
Administrator	52%	44%	4%		
Professional Adviser	50%	38%	9%	3%	
Other	70%	27%	3%		

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Consultants and "sham" substitution clauses

The practice of engaging consultants through a service company to carry out work has for a long time been used in the UK, often as a safeguard to prevent the inference of either employment or the lesser "worker" relationship between the individual consultant and the client company.

The use of such arrangements is also often regarded as a way of reducing payroll costs, which, in the current economic climate, may be an attractive option to businesses, many of which are considering ways of restructuring and cost-cutting.

By including in agreements between the client business and the service provider (or direct with the individuals providing the service) provisions that the service is not "personal" and allowing substitution of personnel to carry out the work ("substitution clauses"), parties to agreements have sought to point away from an employment relationship between the client and the individual.

However, there remains a risk that a status of employee or worker could be inferred by courts as a matter of fact. A recent case has more worryingly demonstrated that, even with the inclusion of a substitution clause, the client may have liabilities it has not bargained for arising from its contracting out of work, where such a clause is found to be a "sham".

The Redrow Homes case

In *Redrow Homes v Buckborough & Sewell*. *UKEAT/0528/07*, the claimants were bricklayers with whom Redrow contracted under individual "sub-contracting" documents which stated that they were self-employed. The subcontracts included a substitution clause which permitted the individual bricklayer to provide alternative personnel to carry out the work and indeed required the bricklayer to provide additional personnel to ensure the work was carried out. The substitution clause also specifically stated that the obligation to perform work was not personal to the bricklayer.

Subsequently, the claimants claimed that they were "workers" under the Working Time Regulations 1998, rather than genuinely self-employed individuals, and so were entitled to statutory minimum paid annual leave.

On appeal, the Employment Appeal Tribunal found that on either of two grounds the claimants were in fact "workers" and not genuinely self-employed individuals:

1. The substitution clause was a "sham", in this case, not because it was intended to deceive the court or third parties, but because the clause was not genuinely intended by the parties to be operated; and,
2. in any event, there was an express requirement for necessary labour to be provided by the claimants, such that there was in fact (contrary to the express wording of the contract) an obligation for the claimants to provide the services personally.

Intentions are important

Therefore when businesses are considering engaging consultants to carry out work - possibly in light of a restructuring - it is important to consider whether a substitution clause is genuinely intended by the parties to be operated, since if they are not, then it is very likely a different status of employment could be inferred by the tribunal. This finding could give rise to significant liabilities on the part of the client in terms of employees' and/or workers' rights.

Where possible, it will be in the interest of the client business to agree to indemnities in the agreement to take account of risks of individual consultants being treated as workers or employees.

Tax implications

An employment tribunal's analysis of the employment status of an individual who is purportedly self-employed is separate to HMRC's analysis of employment (and therefore taxation) status.

However, where there is a risk that an individual may in fact be an employee for the purposes of employment legislation, consideration must also be given as to whether HMRC would also consider the individual an employee, since there would then be liability for income tax and National Insurance contributions through PAYE.

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The "IR35" and managed service company ("MSC") taxation rules must also be considered in this context. The IR35 rules were introduced by the Government to prevent the practice by consultants of providing services through an intermediary – usually a service company controlled by the consultant - where the consultant would otherwise be regarded as an employee of the client for taxation purposes.

Where IR35 applies, the intermediary is required to operate PAYE and pay National Insurance contributions on all earnings from the engagement. Salary paid to the employee should be taxed in the usual way during the year, and at the end of the tax year the intermediary should calculate what further payments, if any, are required to be paid in respect of other earnings from the engagement, and account to HMRC for the same.

The MSC rules were implemented in 2007 to reduce the administrative burden on HMRC in respect of IR35. The MSC rules apply in similar circumstances to IR35, but also where the consultant does not effectively control a service company, which otherwise generally means the arrangement falls outside of IR35.

Where the MSC rules apply to an arrangement, income tax and National Insurance contributions must be applied by the MSC in respect of all payments made to the consultant (i.e. all income of the consultant is deemed to be employment income), subject to certain exceptions.

There is also provision in the MSC rules for transfer of taxation debts and penalties to third parties, including the MSC's directors, where such deductions are not made by the MSC and where it is unable to do so.

Conclusion

In the context of contracts between a client and individual consultants or their service company, the parties need to be alert to the risk that, even with the inclusion of clauses seeking to ensure that a worker or employee status does not arise in respect of the consultants, the law will look behind the agreement as to whether the operation of such clauses is genuinely intended in practice; the result may be that the client could have liabilities to the consultant as a worker or an employee.

In the context of contracts between a client and an intermediary service company or partnership for the provision of a consultant's services, the intermediary should always consider whether the provisions of IR35 or the MSC rules apply to the engagement and if they do, apply the correct taxation treatment to payments made to the consultant which arise (indirectly) from the engagement.

By John Plant

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Case law update

Long-term sick entitled to paid holiday

Stringer and others v HM Revenue and Customs ECJ C-520/06 and Schultz-Hoff v Deutsche Rentenversicherung Bund ECJ C-350/06

Workers on long-term sickness absence are entitled to accrue paid holiday and to take this (or be paid for it) at a later date, even in a subsequent leave year.

Why care?

The EC Working Time Directive states "every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice". Payment in lieu of this minimum entitlement is prohibited except on termination of employment.

The case

Stringer (formerly reported as *Commissioners of Inland Revenue v Ainsworth and others* [2005] IRLR 465 (CA)) concerned a number of conjoined cases. One employee, Mrs Khan, argued that under regulation 13 of the Working Time Regulations she should be entitled to take 4 weeks' paid holiday while she was otherwise on sick leave, for so long as she remained employed. Other employees argued that they should be entitled upon dismissal to payment of holiday accrued whilst on sickness absence. Whilst the tribunal and the Employment Appeal Tribunal found in favour of all the employees, the Court of Appeal allowed their employer's appeal, and the House of Lords then referred the case to the ECJ.

In the German *Schultz-Hoff* case, an employee was absent from work for over a year due to illness and then brought a claim for holiday pay for leave that he was unable to take in two holiday years before the termination of his employment. Under German law, holiday lapses if not used within three months of the end of the relevant holiday year.

The ECJ noted that the Directive does not differentiate between workers who are absent and those who have worked during the year, and therefore the right to paid holiday must be implemented equally. The purpose of sick leave is to allow the worker to recover from illness, whilst the purpose of holiday is to provide a period of rest, relaxation and leisure. One type of leave cannot displace entitlement to another type. There is nothing to prevent member states deciding in their national legislation that workers may not take holiday whilst absent due to illness.

The case will now return to the House of Lords, who are expected to overturn the Court of Appeal's decision and find in favour of the employees. There may also be amendments to the Working Time Regulations 1998 to reflect the ECJ's finding that holiday entitlements may be carried to a subsequent leave year where the employee has been unable to take it due to absence.

What to take away?

After years of uncertainty, the ECJ decision has clarified the law in this area. Workers absent on sickness leave – and by extension, absent on other types of long-term leave such as maternity leave – continue to accrue paid holiday. National law can prohibit employees on sickness leave from taking that paid holiday, but if so they must either be allowed to take it on their return (even if that means that it is carried forward into another leave year), or be paid for it upon termination of their employment.

However, questions still remain. It is unclear what employers should do where their workers are entitled to more than statutory holiday: it would be possible to limit holiday accrual only to statutory holiday, but the saving in costs may be outweighed by the administrative burden of doing so.

It appears that employees entitled to permanent health insurance benefits will still be entitled to additional holiday pay if they remain employees. The ECJ decision states that workers must be entitled to holiday pay at their "usual rate of remuneration" – but it is less clear what this should be where employees receive only permanent health insurance benefits (and may have accepted under the terms of the scheme that they are entitled to no further payments from their employer), or where they have exhausted their right to sickness pay.

Transferee not obliged to consult after a TUPE transfer

UCATT v (1) Amicus (2) TGWU (3) Glasgow City Council (4) City Building (Glasgow) LLP EATS/00007/08/MT and (1) Amicus (2) TGWU v (1) UCATT (2) Glasgow City Council (3) City Building (Glasgow) LLP EATS/0014/08/MT

After a TUPE transfer, the transferee is not obliged to consult transferred employees' representatives about measures envisaged which could affect those transferred employees.

Why care?

Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 requires employers of employees who might be affected by measures envisaged as a consequence of a transfer to inform and, where necessary, consult employee representatives about those measures.

The case

Glasgow City Council transferred its building services division, and 2,000 of its employees, to City Building (Glasgow) LLP on October 2006. The LLP was incorporated in July 2006 expressly for this purpose and had no employees until the transfer.

UCATT, Amicus and the TGWU all brought claims under TUPE and the three cases were conjoined. (However, the EAT decided that UCATT's application to amend their originating application was out of time and upheld the Tribunal's decision to refuse to admit it. Therefore, UCATT had no standing in the subsequent hearing.)

Amicus and the TGWU, who represented affected employees, argued that both the Council and the LLP had failed to comply with Regulation 13 of TUPE. The Employment Tribunal found that there was no obligation on the LLP, as transferee, to consult representatives after the transfer as the framework of the legislation was based upon a pre-transfer timetable.

Amicus and the TGWU appealed to the EAT, on the basis that the transferor's duties were pre-transfer only, but the transferee's were not and that there was no cut-off date for the duties to inform and consult.

The EAT rejected the appeal and concluded that both the transferee and the transferor are subject to duties to inform and consult which cease upon the date of the transfer. Any consultation after the transfer would be "meaningless" according to the EAT, since the purpose of information and consultation is to enable employees to decide whether to object to the transfer. After the transfer, employees have the usual protection of employment law. The time limit for bringing a claim for failure to inform and consult runs from the date of the transfer, so there cannot be a claim for later failure to do so.

What to take away?

This Scottish case is helpful to employers as it clarifies the scope of the transferee's duties to its new employees post transfer. However, if measures are envisaged it may still be necessary to consult either individually or collectively (especially if those measures are likely to result in dismissals).

The case is also a reminder of the importance of careful drafting of claims, as UCATT's application to amend out of time was rejected.

Hot topics

Changes to European Works Councils announced

Multinational employers may see an increase in demand from employees for European Works Council arrangements, following amendments agreed to the European Works Council Directive at the end of last year. The Directive requires that employers with more than 1,000 employees in the European Economic Area (and at least 150 of whom must be in each of at least two separate member states) must negotiate with employees to set up a works council if a request is received from more than 100 employees in two or more countries.

Under the new rules, employers will be obliged to tell unions and employer organisations when they begin negotiations with employee representatives as to the form of the new arrangements. An employer will now be under a more onerous duty to inform and consult representatives, which is likely to increase the frequency of meetings with representatives.

To achieve a period of transition, the modified Directive will not apply to European Works Council agreements made or revised in the two year period following the adoption of the Directive. Any employer who falls within its scope should therefore consider now whether it is sensible to put in place arrangements under the old rules, or revise existing agreements, in order to minimise the effect of the change.

Increased powers proposed for the Information Commissioner

In response to a review of data protection laws published in July 2008, the Ministry of Justice has now published the Coroners and Justice Bill which will amend the Data Protection Act 1998 to make it more effective. Under the changes, the Information Commissioner will be able to:

- demand (by way of an information notice) that a data controller provides certain information to the Commissioner, by a set time, at a set place and in a specific form;
- obtain a warrant for entry and inspection of data;
- order any person on the data controller's premises to explain any document or material on the premises, and to provide such information as is reasonably required to assess any breach of data protection law. It will become a criminal offence to deliberately or recklessly make false statements in response to such a request;
- serve assessment notices on public bodies so that the Information Commissioner can establish whether there is compliance with data protection law.

Greater health and safety penalties for employers

On 16 January 2009 the Health and Safety (Offences) Act 2008 came into force, increasing the maximum penalties for violations of the Health and Safety at Work etc Act 1974 after that date, making imprisonment for up to two years a possible punishment for a wider number of breaches.

Any individual, including workers, managers and directors, can be prosecuted if they have failed to take reasonable care for the health and safety of themselves or others affected by their acts or omissions, whilst more senior individuals including directors, managers and officers can be brought to court for "neglect, consent or connivance" where such behaviour resulted in harm. Fines of up to £20,000 for some offences and unlimited fines for others may be ordered for breaches of the law.

Employers should see the new Act as a reminder that both companies and individuals should be doing everything possible to comply with health and safety legislation, including reviewing policies and how they are implemented in practice.

European Commission recommends retaining 48 hour week opt-out

The European Commission has published its opinion on the European Parliament's proposal to remove the right to opt out of the maximum 48 hour working week under the Working Time Directive. It has concluded that it should be retained - for now.

The Commission does not feel that the present economic conditions are right to remove the opt out, or to limit it to a six month period only; however, it still supports the European Parliament's intention to gradually phase out the opt out when the timing is right, and in the meantime the Commission supports the opt out to be permitted only after appropriate safeguards and other forms of flexibility have been examined, and after the worker has passed any probationary period. The Commission also agreed with the Parliament that the inactive part of on-call time should be considered as working time, and not rest.

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