

January 2012

### Court of Appeal Rules on TUPE Transfers and Administrations

In two separate cases the Court of Appeal has given guidance on the operation of the 'automatic transfer' principle under the TUPE Regulations 2006 ("TUPE") where a company goes into administration.

Under regulation 8(7) of TUPE the principle that employees of one company automatically transfer to another on the transfer of the business is disapplied where insolvency proceedings have been instituted "...with a view to liquidating the assets of the transferor." However, it was unclear whether regulation 8(7) applied to Companies in administration where one of the principle purposes of the administration is to rescue the business as a going concern.

In *Key2Law (Surrey) LLP v De'Antiquis* the Court held that an administration does not constitute "insolvency proceedings" for the purposes of TUPE meaning that an employee (in this case, a solicitor) was protected against a transfer connected dismissal.

In the case of *Spaceright Europe Ltd v Baillavoine* the Court also held that a pre-transfer dismissal by an administrator can be connected with the transfer even where no transferee had been found or was even in contemplation at the time of the dismissal. Therefore, such a dismissal by an administrator is potentially unfair. The Court went further to hold that an administrator's desire to dismiss employees 'pre-transfer' to make the business more attractive to potential purchasers was not an "economic, technical or organisational" reason entitling the administrator to dismiss. The dismissal of the Claimant was therefore automatically unfair.

### IR35 Status Change Ruling

The First Tier Tax Tribunal has confirmed that a contractor can become an employee for IR35 purposes over time and that their status must be kept under review.

In this case a contractor employed through a personal service company was initially only engaged for short periods. However, from 2003 the contractor was engaged on annual contracts which were not linked to specific projects.

The contractor therefore became employed for tax purposes. Such arrangements will now need to be carefully monitored.

*These notes are for guidance purposes only. We believe the contents to be correct but it should not be taken as sufficiently accurate or full to apply in any specific situation without first referring to us. We would be pleased to advise on any specific issues or problems.*

### Annual Leave Ruling

The Supreme Court has held that an employer could force those employees working on offshore installations to take their annual leave entitlement during "field breaks" spent onshore and refused to refer the matter to the European Court of Justice for further determination.

The ruling will also be relevant to employers in other sectors where their employees have traditionally taken holiday during periods where they were not required to work such as those in the tourist industry, entertainers, teachers and professional sportsmen and women.

### Britains Got Talent Claim Fails

A contestant on the "Britains Got Talent" variety show has failed in her claims against the shows two co-producers and two of the judges, Simon Cowell and Amanda Holden.

She had primarily claimed that reasonable adjustments had not been made to accommodate her disability and that she had subsequently been harassed.

Her claim failed primarily because (1) the Respondents were unaware of her disability (2) there was no contract of employment between her and any of the Respondents and (3) that her claims were out of time in any event.

### Pension Auto-Enrolment Delay

The Department for Work and Pensions has confirmed that the pension auto-enrolment staging dates for businesses with fewer than 50 employees will be delayed by at least a year.

A revised staging timetable and guidance is to follow. The largest businesses are unlikely to be affected.

### Increase in Rates and Limits

The maximum compensatory award for unfair dismissal is to increase from £68,400 to £72,300 from 1st February 2012 with the cap on a weeks pay (for calculating redundancy and certain other awards) increasing from £400 to £430 per week.

Statutory maternity, paternity and adoption pay will increase from £128.73 to £135.45 per week from April. Statutory Sick pay also increases in April from £81.60 to £85.85 per week.

Maternity allowance increases from £124.88 to £135.45 per week also from April 2012.

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