

# Employment Rights Update

February 2010



*This* month we have identified 3 cases that we hope you will find helpful. They relate to:-

- Contracts of employment
- TUPE
- Holiday Pay

## ***Autoclenz Ltd v Belcher & others***

This case concerned car valeters who had been engaged by Autoclenz Ltd to valet cars at British Car Auctions. They were all recruited via self-employed adverts, signed contracts that referred to them as 'sub-contractors', they could provide a substitute to carry out the work and none of the valeters was under any obligation to provide his services on any particular occasion. In effect, the contract tried to prevent the individuals from having any employment rights. The Court of Appeal found that they were, in fact, truly employees and had employment rights on the basis that the terms of the contract were a sham. They stated a Court or Tribunal needs to examine the whole picture to investigate and assess the true reality of the relationship. This means it will now be easier for individuals who have been classed as self-employed to show that such terms are a sham and that they are really employees. In this specific case, the Court of Appeal found that no one seriously expected the valeters to ever provide a substitute and, in reality, the valeters were expected to turn up every

day to do the work provided, so they were subject to the necessary degrees of mutuality of obligation and control.

This is an excellent decision for employees and workers as it allows a Court or Tribunal to look behind the contract and focus on the true reality of the relationship.

## ***OCS Group UK Ltd v Jones & another***

At BMW's Oxford plant, OCS ran the canteens supplying a full catering service (good old fashioned hot food) and in 2007 BMW agreed that there would be a contract change with MIS taking over the contract but supplying only a limited kiosk service (cold food only, such as pre-prepared sandwiches and salads). The question for the Tribunal was whether there was a TUPE transfer by way of a 'service provision change': the change from one contractor, OCS, to another, MIS. The EAT has found that there was not a TUPE transfer, saying that there needs to be an examination as to whether the activities carried out by MIS were fundamentally or essentially the same as those carried out by OCS. The EAT found that there were sufficient differences in the food service (a full catering service vs a limited kiosk service) making the 'activities' too different and meaning that TUPE did not apply.

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Unfortunately, this case will make it easier for employers in practice to avoid TUPE where there is a 'service provision change' when there is a difference between the activities carried out by the outgoing contractor and the incoming contractor.

## ***Leeds Tribunal Decides That Worker On Sick Leave May Carry Over Holidays Into The Next Leave Year***

Morrish Solicitors LLP recently represented a union member in one of the first cases to be brought before the Employment Tribunals concerning the interpretation of the Working Time Regulations 1998 following on from the European Court decisions of *Stringer* and *Perada* published last year .

We were successful in arguing that, as a result of these decisions, the Working Time Regulations 1998 should be interpreted purposively and that a worker who was unable to take a period of annual leave because of sickness should be allowed to carry that untaken period of leave either to a later date in the same holiday year or, if necessary, into the new holiday year. Such an interpretation was necessary to ensure that the Regulations carried into effect the provisions of the European Directive which led to the original introduction of the Regulations.

It is important to stress that this was not an argument about the recovery of pay. That was always secondary. The primary issue was whether the period of leave should be made available at another time.

In this case the Employment Judge felt, having considered the history of the Regulations and their purpose, that it was compatible to interpret them in a way which meant that the Claimant could take his annual leave at a later date upon returning to work. Further, if there was insufficient time within the remaining leave year then the outstanding leave could be rolled over into the new leave year. In arriving at this conclusion it was noted that the primary purpose of the annual leave provisions of the Working Time Regulations 1998 was to promote health and safety by guaranteeing adequate rest periods to workers. Accordingly, the Tribunal was prepared to introduce words into the provisions of Regulation 13(9) that permitted leave, otherwise lost because of sickness absence, to be taken at a later date on returning to work. By doing this, an impediment to taking annual leave was removed.

It is believed that this is the first such case to come before the Tribunal since the European Court decisions in *Stringer* and *Perada* were published. It represents an important step forward for Claimants forced to take sick leave during the course of the annual leave year because it preserves the right to annual leave given to

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them by the Working Time Regulations 1998, previously thought to be forfeit. The short and concise judgment also maps out clearly the issues to be addressed by any Claimant seeking to rely directly on decisions of the European Court and how the UK courts might deal with such matters.

For a full copy of the transcript go to

<http://www.incomesdata.co.uk/areas-of-expertise/employment-law/downloads/Shah.pdf>

For further discussion on this topic please see our employment law blog on <http://morrishsolicitors.blogspot.com>

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or suggestions for improvement to [jayne.phillips@morrishsolicitors.com](mailto:jayne.phillips@morrishsolicitors.com)

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