

news

Part-timers – the TUPE twist

The latest decision in the Preston part-timer saga was handed down by the Employment Appeal Tribunal ("EAT") in December 2003, with the EAT reversing the earlier decision of the Employment Tribunal on the impact of TUPE¹ on part-timers' claims. Part-timers seeking additional pensionable service in these circumstances can now bring a claim against their old employer at any time whilst they remain employed by their new employer (and up to 6 months after leaving).

The decision could have a major impact on part-timer claims which have not yet settled. It also has wider implications for commercial transactions generally.

Background

House of Lords

- In February 2001, the House of Lords established certain principles to be applied for all part-timer claims² coming before Employment Tribunals.
- One of these principles is that the time limit for bringing a claim is 6 months from leaving employment. This time limit has been strictly applied since this decision.

ET and TUPE

- In August 2002, the Employment Tribunal ("ET") clarified the law on a number of issues still outstanding from the House of Lords' decision.
- In particular, the ET decided that liability for claims by part-timers to backdated membership of pension schemes did not pass to the new employer on a business transfer under TUPE.
- Therefore, liability remained with the old employer and the 6 month time limit for bringing a claim ran from the date of the TUPE transfer.

¹ The Transfer of Undertakings (Protection of Employment) Regulations 1981 – on a business transfer, rights and obligations arising from contracts of employment, collective agreements or the employment relationship automatically transfer between the old and the new employer

² Claims under the Equal Pay Act 1970

The Appeal

- The Unions appealed, arguing that this was an unfair and arbitrary decision as many employees would not have known the date of their TUPE transfer. The result was that many had no claim at all against either their old employer or their new employer.
- In contrast, the employers argued the need for certainty. If the time limit does not start running from the date of the TUPE transfer, employers could be waiting many years for contingent claims to crystallise.

EAT and TUPE

- On 19 December 2003, the EAT allowed the Unions' appeal.
- Judge McMullen QC concluded that, under TUPE, an employee's service with the old and new employer is continuous (the contract of employment therefore continues intact after the transfer).
- Given this, a claim can be brought against the old employer throughout the period of employment with the new employer, plus 6 months.

Employers

What does this mean?

- If part-timer claims have not already settled or been dismissed by the ET then employees still working for their new employer can bring a claim against their old employer at any time.
- Employers who have made no provision for such claims should now consider doing so.
- When involved in future TUPE transactions, the transferring employer will need to factor this contingent liability into the business deal.

What next?

- An appeal has been lodged by the employers against this decision which, if it proceeds, will be heard by the Court of Appeal.
- This appeal creates yet more uncertainty and therefore, for existing claims, will result in a further stay of these long outstanding claims until the appeal is heard.
- In the meantime, this is the law as it stands and its implications should be borne in mind in any TUPE transaction.

If you would like further information about part-timers in relation to TUPE please contact:

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