RPC

Employment update

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Marks and Spencer v BNP Paribas Securities Trust

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Any comments or queries?

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Disability discrimination: is the duty to make reasonable adjustments engaged where an employer takes action against a disabled employee under its attendance management policy?

Griffiths v Secretary of State for Work and Pensions (Griffiths)

The Court of Appeal has dismissed a claim that an employer failed to make reasonable adjustments for an employee's disability under section 20 of the Equality Act 2010 (**EqA**) as the proposed adjustments had not been reasonable in all the circumstances. **more›**

Zero hour workers: Exclusivity Terms in Zero Contract Hours Contracts (Redress) Regulations 2015 (Regulations) to come into force on 11 January 2016

On 11 January 2016 the Regulations will come into force. These Regulations provide a remedy for zero hours workers against employers who include exclusivity clauses in their contracts of employment. **more›**

Implied terms: when can a term be implied into a contract?

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The Supreme Court has clarified the law on implied terms: to be implied it must be necessary for business efficacy or alternatively be so obvious as to go without saying. The court held that given the widespread misinterpretation of the decision in *Attorney General of Belize and others v Belize Telecom Ltd* (**Belize**), it should no longer be treated as authoritative guidance on the law.

Facts

Although the facts relate to a property transaction, the underlying test will be adopted when implying terms into a contract of employment. This appeal concerned a tenant's break clause in a lease. The lease had been granted for a term expiring in February 2018 and the rent was payable in advance in quarters. The tenant exercised its right under the break clause to determine the lease in January 2012, after it had already paid the full quarter's rent which was due in December.

The issue was whether the tenant could recover the apportioned rent in respect of the period from January to March. The resolution of this issue turned on the interpretation of the lease and required the court to consider the principles relating to when a term is to be implied into a contract.

Pre-*Belize* tests for implying terms

The following two tests have been most commonly used when determining whether a term should be implied into a contract:

- **business efficacy** test: the proposed term will be implied if it is necessary to give business efficacy to the contract (*The Moorcock*)
- **officious bystander** test: the proposed term will be implied if it is so obvious that, if an officious bystander suggested to the parties that they include it in the contract, 'they would testily suppress him with a common 'oh of course'' (*Shirlaw v Southern Foundries*). In other words, the proposed term must be so obvious that it goes without saying.

The test in *Belize*

The most recent commonly cited test is taken from Belize, where Lord Hoffman said "there is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood?"

Outcome

The Supreme Court held that this formulation in Belize has been misinterpreted as suggesting that reasonableness is a sufficient ground for implying a term. The court confirmed that business necessity is required for a term to be implied into a contract and that the decision in Belize has been misinterpreted as diluting this requirement.

Furthermore, the court considered whether the processes of contract interpretation and implication of terms are separate. The court held that they are and that it is, therefore, important that the terms of the contract are construed before the process of implying terms.

The test for implying terms into contracts

The court held that Belize should no longer be treated as authoritative guidance on the law of implied terms. Instead, the pre-Belize authorities should be considered, notably the summary of the conditions in *BP Refinery v Shire of Hastings* (**BP Refinery**), as extended in *Philips Electronique v British Sky Broadcasting Ltd* (**Philips**). Lord Neuberger also added six comments to theses authorities.

The summary of conditions for implication in *BP Refinery*

In *BP Refinery*, Lord Simon said that for a term to be implied, the following conditions (which may overlap) must be satisfied:

- it must be reasonable and equitable
- it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it
- it must be so obvious that "it goes without saying"
- it must be capable of clear expression
- it must not contradict any express term of the contract.

Conditions in *Philips*

In *Philips*, the conditions in BP Refinery were described as a summary whose simplicity could be misleading. The court stated it is difficult to infer with confidence what the parties to a lengthy and carefully drafted contract must have intended. An omission may be the result of the parties' oversight or their deliberate decision. It is tempting, but wrong, for a court, with the benefit of hindsight, to imply a term which reflects the merits of the situation as they then appear. The term to be implied must be either the only contractual solution or the one which would, without doubt, have been preferred.

Lord Neuberger's six comments on the test for implying terms

Lord Neuberger offers six comments on the requirements for implication set out in *BP Refinery* as extended in *Philips*. These are as follows:

- what matters is not the hypothetical answer of the actual parties, but that of notional reasonable people in the position of the parties at the time at which they were contracting.
- a term should not be implied into a detailed commercial contract merely because it appears fair.
- the requirement from BP Refinery that implied terms must be reasonable and equitable adds nothing. If a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable
- business efficacy and the officious bystander tests are not cumulative. Only one of these requirements needs to be satisfied (although the other requirements in BP Refinery are cumulative)
- it is important to correctly formulate the question asked by the officious bystander. Lord Neuberger cited Lewison in *The Interpretation of Contracts, 5th ed (2011), para 6.09*; the book criticises questions which suggest only one answer
- necessity for business efficacy involves a value judgment. The test is not one of "absolute necessity". A term can only be implied if, without the term, the contract would lack commercial or practical coherence (Lord Sumption's suggested reformulation of the business efficacy test).

Points to note

This is an important judgment which re-states the law on implied terms and is therefore relevant to drafting contracts or contractual disputes.

This case reinforces the current judicial trend against implying in terms into a contract unnecessarily. The judgment confirms that courts and litigants can safely argue for an implied term on the basis of "business efficacy" or the "officious bystander" test, without inciting an appeal about the correct formulation for finding an implied term.

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TUPE: does a relevant transfer include insourcing of rail freight management?

Administrador de Infraestructuras Ferroviarias (ADIF) v Aira Pascual and others

The ECJ has held that the Acquired Rights Directive (the **Directive**) covers the situation where a public railway authority takes back in-house the management of a rail freight service that had previously been outsourced to a private company using the public authority's own equipment and facilities.

Facts

The Acquired Rights Directive's purpose is to protect employee's rights on a transfer of an undertaking. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) implements this Directive in Great Britain.

Administrador de Infraestructuras Ferroviarias (**ADIF**) is a public undertaking which is responsible for the rail infrastructure in Spain. ADIF outsourced the handling of intermodal transport units (freight containers) to Algeposa. Algeposa provided the service for just over five years, using cranes and other equipment belonging to ADIF.

Before ADIF terminated the contract, it seconded some of its employees to Algeposa to complete an immersion training programme. Following this, ADIF informed Algeposa that it did not wish to extend the agreement and took back the service in-house with the intention of providing the service using its own staff. ADIF refused to take any of Algeposa's staff.

Subsequently, Algeposa carried out a collective dismissal for economic reasons for several workers, including Mr Aira Pascual. He brought proceedings in a Spanish labour tribunal arguing that ADIF was obliged to take over his employment.

The tribunal granted his action and ADIF appealed to the High Court. The court referred the issue to the ECJ to determine whether the Acquired Rights Directive applied.

Outcome

The ECJ held that the Directive is capable of applying in the above situation. Specifically: where an organisation (the **Client**) that has procured a service (which, also, requires the contractor to use those resources which the Client owns), refuses to take over the rights and obligations relating to employees when it decides not to extend the contract but to provide the service itself, using its own staff and without taking over the staff employed by the contractor.

The Directive is capable of applying to the insourcing of a previously outsourced service. The fact that the transferee is a public body is not a ground for excluding the Directive. A multifactorial approach should be adopted when deciding whether there is an economic entity which retains its identity; no one factor can be considered in isolation.

Where an activity is based essentially on manpower, the identity of the economic entity cannot be retained if the majority of the employees are not taken on by the transferee. However the activity in this case cannot be regarded as an activity based essentially on manpower, since the service in question requires significant amounts of equipment. Therefore, the fact that ADIF did not take over any of Algeposa's employees did not prevent there being a transfer.

The ECJ has previously held that the transfer of the ownership of the assets is not necessary for there to be a relevant transfer (*Abler v Sodexho MM Catering Gessellschft mbG*). Therefore the Directive could still apply even though in this case the tangible assets essential to the activity were owned at all times by ADIF, the transferee.

The court concluded that it is for the national court to determine whether, taking account of all the facts, there is a transfer.

Points to note

This case highlights that for situations where there is a change in the organisation responsible for the provision of a service, the Directive (and, therefore, TUPE) may still apply where there is no actual transfer of the ownership of assets or employees. In addition, under TUPE there is the alternative "service provision change" test, where the focus is on the nature of the service, ignoring assets.

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TUPE: are subsequent events relevant to whether a task was intended to be of "short-term duration"?

ICTS UK Ltd v Mahdi and others

The Employment Appeals Tribunal (**EAT**) has held that when considering whether a transferor "intends" that services will be carried out by a transferee in connection with a single specific event or task of short-term duration it can consider events after the alleged transfer.

Facts

TUPE applies where there is a "relevant transfer". A relevant transfer can be a business transfer or a service provision change. In order for there to be a service provision change the party must also intend that the relevant activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of "short-term duration". This case considered in what circumstances this task of 'short-term duration' exception applied.

ICTS UK Ltd **(ICTS)** had a contract with Middlesex University to provide security at its Trent Park campus. In 2012 the University closed the campus and ICTS continued to guard the vacant site.

In July 2013 the site was purchased by a Malaysian university AUCMS. ICTS continued to provide security and produced a draft contract for the new owners to sign. However in October 2013, AUCMS informed ICTS that it would appoint a new security company, First Call Secure Group Ltd (**First Call**) with effect from 11 November 2013. In a letter sent by email to ICTS on 11 November 2013, First Call refused to take on any of the ICTS security guards as it said that there had been no relevant transfer under TUPE.

Ten ICTS security guards who lost their jobs brought claims. In response to these, First Call argued that the 'short-term duration' exception in TUPE applied. It stated that as ICTS had entered into a contract to secure what was intended to become a building site, pending completion of the major renovation of the site, and that this construction project was therefore a task of 'short-term duration'.

An ET rejected First Call's argument that the activities it had been instructed to carry out were different from those previously provided by ICTS. However it accepted that the activities were intended to be carried out in connection with a task of short-term duration. The ET judge considered that the relevant intention was that of AUCMS as at 11 November 2013 and that he was prevented from looking at subsequent events in determining that intention. He found that it was logical to infer that the site would only remain unoccupied for a limited period, even though there was no evidence as to how long this period was likely to be. The ET therefore held that there had been no relevant transfer under TUPE.

Outcome

The EAT held that the ET judge had erred in wholly ignoring events occurring after 11 November 2013. Although the exception is based on the intention at the time of the transfer, the EAT held that subsequent events can be relevant in deciding what that relevant intention was. For example, the ET judge disregarded the fact that as at the date of the tribunal hearing, no planning permission had been granted for any major building project at the site and no building work had taken place.

The EAT was not convinced that this failure made no difference to the outcome as the evidence regarding the current state of the site may have affected the judge's decision.

ICTS also sought to argue that the ET judge had misapplied the burden of proof in relation to the exception. It argued that the party relying on the exception should establish that it applies. The EAT held that there is not a positive burden of proof on a service provider to adduce specific evidence of their client's intention. Rather, it was appropriate for the tribunal to draw inferences of the client's intention from the facts as presented.

The EAT allowed the appeal and remitted the case back to the ET.

Points to note

This case emphasises the importance of establishing the relevant party's intentions at the time of the transfer. This can be done by using post-transfer events as these may well have bearing on what the party intended.

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Disability discrimination: is the duty to make reasonable adjustments engaged where an employer takes action against a disabled employee under its attendance management policy?

Griffiths v Secretary of State for Work and Pensions (Griffiths)

The Court of Appeal has dismissed a claim that an employer failed to make reasonable adjustments for an employee's disability under section 20 of the Equality Act 2010 (EqA) as the proposed adjustments had not been reasonable in all the circumstances.

Facts

Under section 20 of the EqA an employer has a duty to make reasonable adjustments where it knows (or ought reasonably to know) that a person has a disability and there is a provision, criterion or practice (**PCP**) which places the disabled person at a substantial disadvantage compared to those who are not disabled. Failure to make a reasonable adjustment amounts to discrimination.

The appellant employee, Ms Griffiths, appealed against the Employment Appeals Tribunal's (**EAT**) dismissal of her appeal against a decision that the respondent employer's failure to make reasonable adjustments for her disability did not breach section 20 of EqA.

Ms Griffiths was an administrative officer at the Department for Work and Pensions (**DWP**). Following a 62 days absence from work due to post-viral fatigue, an occupational health assessment was conducted and she was found to be suffering from fibromyalgia.

The DWP had an attendance management policy which was activated when an employee reached 'the consideration point'. This was eight working days' absence in any rolling 12 month period; this could be extended as a reasonable adjustment for disabled employees.

When Ms Griffiths had reached the consideration point she was issued with a written warning. No extension was granted in respect of her disability. Ms Griffiths' trade union brought a grievance on her behalf in which she claimed that DWP had failed in its duty to make reasonable adjustments as DWP should have treated the 62 day absence as an exceptional absence and that the written warning should have been revoked. She also contended that the consideration point should have been extended by an additional 12 days with the effect that no disciplinary action would be considered until after 20 days' absence.

The employment tribunal (**ET**) dismissed the claim holding that the duty to make reasonable adjustments was not engaged. It went on to consider whether the adjustments were reasonable in any event and concluded that they were not. Ms Griffiths appealed.

The EAT dismissed the appeal and upheld the decision of the ET on the same grounds. The PCP relied on was 'a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal.' The EAT held that as the policy was applied to all employees in the same manner, neither disabled nor non-disabled employees could be disadvantaged. It acknowledged that the policy contained a special further provision for disabled people.

However, it did not consider it was necessary to apply these in order to discharge the duty to make reasonable adjustments. It agreed with the ET that Ms Griffiths had not been put to a substantial disadvantage. It also held that the ET had been entitled to find as a matter of fact that the adjustments were not reasonable. Ms Griffiths appealed to the Court of Appeal.

Outcome
The Court of Appeal dismissed the appeal, upholding the finding that the adjustments sought were not steps which the employer could reasonably be expected to take. However it overturned the EAT's finding in relation to the duty to make reasonable adjustments.

The duty to make reasonable adjustments
The decisions of the ET and the EAT both followed the decision in *The Royal Bank of Scotland v Ashton* (**Ashton**), which was factually very similar to *Griffiths*. In *Ashton* the EAT concluded that the employee was not subject to any disadvantage by the attendance management policy.

However in the judgment in *Griffiths*, Elias LJ identified what he considered to be a number of errors in the reasoning of *Ashton*.

The first error was the way in which the PCP had been formulated. In *Ashton* the EAT had accepted that the PCP was the sickness absence policy itself. The policy applied equally to all employees but gave special allowances for disabled people; formulating the PCP in this way was incorrect as it led to the inescapable conclusion that disabled employees could not be disadvantaged by it.

Elias LJ said that the PCP which should have been applied in *Ashton*, and consequently by the ET in *Griffiths*, was the requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. When the PCP is formulated in this way it becomes clear that this was a requirement that would substantially disadvantage disabled employees whose disability increases the likelihood of absence from work.

Elias LJ also said that in *Ashton* the pool for comparison had been incorrectly identified. The EAT had followed another case which stated that the comparator must be similarly placed to the disabled claimant in all relevant respects, save for the disability. However, applying this comparator in circumstances where disabled and non-disabled employees are treated alike inevitably leads to a finding that no discrimination has occurred.

The Court of Appeal therefore held that both the ET and EAT has been wrong in reaching its conclusion that the reasonable adjustments duty was not engaged simply because the absence management policy was applied equally to everyone. The duty arises once there is evidence that the arrangements place the disabled person at a substantial disadvantage because of the person's disability.

Points to note
This case has determined the position surrounding reasonable adjustments and absence management policies by holding that triggers from disciplinary sanctions under such policies are subject to the duty to make reasonable adjustments.

The trouble with *Ashton* was that it abolished the duty to make reasonable adjustments through establishing an incorrect PCP. It is therefore vital to correctly formulate the PCP in order to be able to demonstrate the disadvantage to which the claimant has been put.

It is also worth noting that claimants should ensure their claims are appropriately pleaded by bringing complementary claims of discrimination arising from disability and indirect discrimination where appropriate.

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Zero hour workers: Exclusivity Terms in Zero Contract Hours Contracts (Redress) Regulations 2015 (Regulations) to come into force on 11 January 2016

On 11 January 2016 the Regulations will come into force. These Regulations provide a remedy for zero hours workers against employers who include exclusivity clauses in their contracts of employment. Exclusivity clauses in zero hour contracts are unenforceable by virtue of section 27A(3) of the Employment Rights Act 1996. The Regulations give zero hours employees the right not to be unfairly dismissed and zero hours employees and workers the right to not be subjected to a detriment for failing to comply with an exclusivity clause.

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