

# The LA employment alert!

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 LesterAldridge LLP

0870 224 0405  
info@LA-law.com  
www.lesteraldridge.com

Bournemouth Southampton London

LEM010/09/LA/LP

 LesterAldridge LLP





# When is a bonus scheme truly "discretionary"?

**In a recent case involving Boots Company plc the EAT found that just because the employer had stated in a bonus scheme that it was "discretionary" this did not necessarily mean that it was not binding.**

The EAT said that the word "discretionary" in a bonus scheme could relate to any one of a number of elements such as: whether to provide a bonus scheme at all; whether the scheme would apply in any given year; the method of calculating any bonus etc.

Tribunals, therefore, are required to look carefully at all aspects of the particular scheme to determine which elements are truly discretionary.

Also, in this case, the EAT found that the Tribunal should have taken into account all relevant facts including that employees had received bonuses over a period of 40 years.

#### Action point

Be very careful when you are drafting bonus schemes or wording in contracts.

This case doesn't really change anything.

It just makes it clear that the Tribunals and Courts will look closely at each element of a bonus scheme when they have to decide whether there is an entitlement and, if so, how much.

Contact us:



01202 786310  
rayner.jones@LA-law.com  
www.lesteraldridge.com

## TUPE – Can it apply to teams of accountants, insolvency practitioners etc moving to rival firms?

**In short, yes.**

TUPE is a complicated area of law. However, where a partner in, say, an accountancy practice moves to another firm and one or more members of staff worked for him/her exclusively or almost exclusively then it is possible that the whole "business unit" will transfer under TUPE to the rival firm.

This is topical at the moment because two US law firms are currently arguing about whether a group of associates working for 7 partners at one firm who jumped ship to the other firm should transfer to that other firm under TUPE.

NB: We should point out that TUPE might also apply where staff spend a lot of their time working for a particular client and that client transfers its work to another firm.

#### Action Point

It sounds daft, we know, but almost any movement of contracts, businesses, parts of businesses or even individuals can, potentially, be subject to TUPE.

#### What can you do about it?

Employers need to develop TUPE "antenna" and, if in doubt, give us a call.



# New Safeguarding Vulnerable Groups legislation

## Background

On 12 October 2009, a new scheme will be launched aimed at vetting individuals who pose a risk of harm to children or vulnerable adults and preventing them from having access to them through work or voluntary activities.

The Independent Safeguarding Authority (ISA) will work in tandem with the Criminal Records Bureau (CRB), which will continue to provide information about criminal records etc.

There are currently three lists which contain information in respect of individuals who are barred from working with children or vulnerable adults:

- One relating to children under the Protection of Children Act 1999 (POCA list)
- One relating to the protection of vulnerable adults (POVA list)
- One being a list of people considered unsuitable for working with children, which is held by the Department for Children, Schools and Families (List 99).

Until very recently the Secretary of State has had responsibility for placing individuals on those lists if they have been referred by their employers for inappropriate conduct.

While the individual and their conduct is being investigated, they would be provisionally included on the relevant list.

## Recent developments

The ISA (which might end up being called the "Independent Barring Board") will take over certain functions from the Secretary of State in the period up to October 2009.

On 20 January 2009, the ISA assumed responsibility for making barring decisions on new referrals under the POCA and POVA lists and List 99 and introduced a number of changes.

The most significant changes for employers to be aware of are that:

- New referrals will no longer be considered for provisional listing on POCA or POVA lists while their case is being investigated

- New referrals must be made to the ISA
- Wording on CRB certificates relating to POCA and POVA lists and List 99 will be amended to reflect the fact that ISA now makes these decisions.

## Action points

As we mention above, new referrals will no longer be provisionally listed on the POCA or POVA lists.

One potential disadvantage of this is that if an employee under investigation moves jobs, the new employer will not know that they may have a problem candidate.

They will, therefore, need to be particularly careful when looking at new recruits.

The ISA recommends that prospective employers should check previous employment history and references carefully. They suggest that if the applicant has previously worked with a vulnerable group, the prospective employer should ask the most recent employer if they have made a referral of any misconduct.

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01202 786310  
rayner.jones@LA-law.com  
www.lesteraldridge.com



## Checklist

The most significant changes for employers to be aware of are that:

New referrals will no longer be considered for provisional listing on POCA or POVA lists while their case is being investigated.

New referrals must be made to the ISA.

Wording on CRB certificates relating to POCA and POVA lists and List 99 will be amended to reflect the fact that ISA now makes these decisions.

Prospective employers should check previous employment history and references carefully.

# Holiday for sick workers

The European Court of Justice (ECJ) has added even more misery to employers who are already facing the gloomy state of the UK economy.

In a decision which heralds additional costs for employers, the ECJ have given their opinion on the rights of employees on long term sick leave with regards to their statutory holiday entitlement.

## Background

The House of Lords referred a number of questions that had been posed in a case on appeal from the Court of Appeal to the ECJ for their judgment.

The questions asked by the House of Lords were in relation to the basic statutory minimum holiday entitlement and what happens when an employee is off on long term sick leave.

In brief the questions and answers from the ECJ were:

**Question:** Do workers on sick leave continue to accrue holiday entitlement, even when they are off for an entire leave year?

**ECJ answer:** *Yes. An employee does not have to be at work and working in order to accrue their statutory right to holiday.*

**Comment:** Are we the only ones who think it is odd that an employee does not have to be at work in order to qualify for a right to have time away from work?!

**Question:** Can a worker who is on indefinite sick leave give notice to take holiday, and take that holiday, during their sick leave?

**ECJ answer:** *The ECJ had no objection in principle for workers to be permitted to give notice and*

*take holiday during their sick leave. However, the UK can decide whether to allow or prevent this.*

**Question:** Can the UK provide that if a worker does not take their holiday during the leave year they lose this entitlement, even where the worker has been prevented from taking this holiday (i.e. due to sickness)?

**ECJ answer:** *Generally the UK can provide that if an employee does not take their holiday entitlement in the leave year they will lose it. However, if an employee is prevented from taking their holiday (i.e. due to sickness) they should be given an opportunity to take it at a later point (i.e. the following leave year).*



“It is likely that employees will be the ultimate losers”.

**Question:** Where a worker has been off sick for all or part of a leave year, when their employment terminates are they entitled to a payment in lieu of untaken holiday? If so, how should that payment be calculated?

**ECJ answer:** *Yes workers are entitled to be paid in lieu of their accrued statutory holiday even where they have been off sick for all or part of the holiday leave year. The payment should be in accordance with what they would have received had they been at work (i.e. they should get paid in accordance with their normal salary/wages before they were off sick).*

## Impact

Workers in the public sector can

enforce the ECJ judgment directly in the UK courts. Therefore, they could bring claims now in respect of this ECJ decision.

Workers in the private sector will have to wait to see how the House of Lords apply the ECJ ruling – although private sector workers may bring claims now so that they are not at risk of being out of time and will ask for the claim to be put on hold until the House of Lords make their decision.

The House of Lords could decide that the UK legislation can be read in accordance with the ECJ decision. This means that employers will have to comply with the ECJ judgment now.

Alternatively, they may say that

the UK legislation needs to be amended. In this case any new legislation that the Government introduces will not have retrospective effect. This means that employers would only need to change to fit with the ECJ judgment when the new legislation comes into force.

## Action

Look out for the House of Lords ruling in order to determine how this will impact your business now and in the future – we will update you in the Alert.

Although this decision will undoubtedly be seen to favour employees, it is likely that they will be the ultimate losers.

Employers are very likely to move to dismiss employees who are on long term sick at an early stage. Some employers may also look at reducing company sick pay to balance off the additional costs.

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