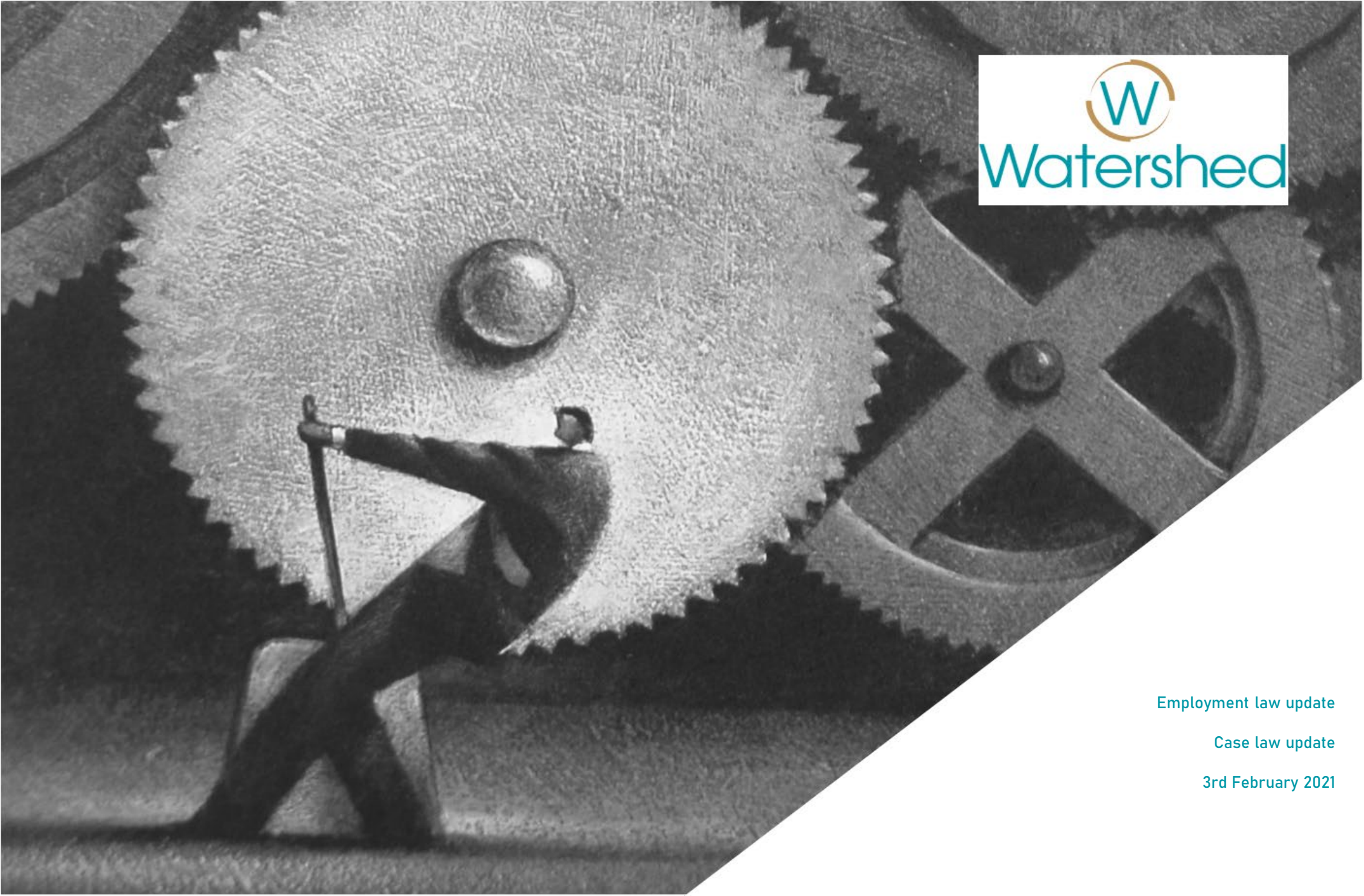

Watershed

Employment law update

Case law update

3rd February 2021

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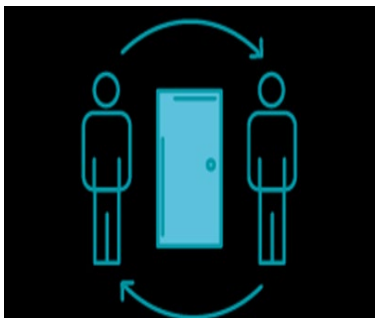
Can one employee transfer to multiple transferees?



The Acquired Rights Directive (ARD) safeguards the rights of employees on a change of employer

TUPE deems a transfer where there is a transfer of an economic entity that retains its identity

A service provision change (regulation 3(1)(b) of TUPE) occurs where:

- activities cease to be carried out by a client on their own behalf and are carried out instead by another person on the client's behalf ('a contractor')
- activities cease to be carried out by a contractor on a client's behalf and are carried out instead by another person ('a subsequent contractor') on the client's behalf
- activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf and are carried out instead by the client on his own behalf

ISS Facilities v Govaets (ECJ)

ISS was responsible for cleaning and maintaining various buildings in Ghent

Ms Govaerts, a Belgian national, was employed as a project manager and her work was spread between three lots - museums, libraries and administrative buildings

ISS lost the contract. Two lots transferred to Atalian NV, to which Ms Govaerts was 85% assigned, and the third lot was transferred to Cleaning Masters NV, to which she was 15% assigned

Atalian disputed the transfer

Questions

Should employment transfer to each of the transferees pro rata to the extent of the employment of the worker in the part of the undertaking acquired by each of the transferees?

Should employment transfer in its entirety to the transferee that acquired the part of the undertaking in which the worker was principally employed?

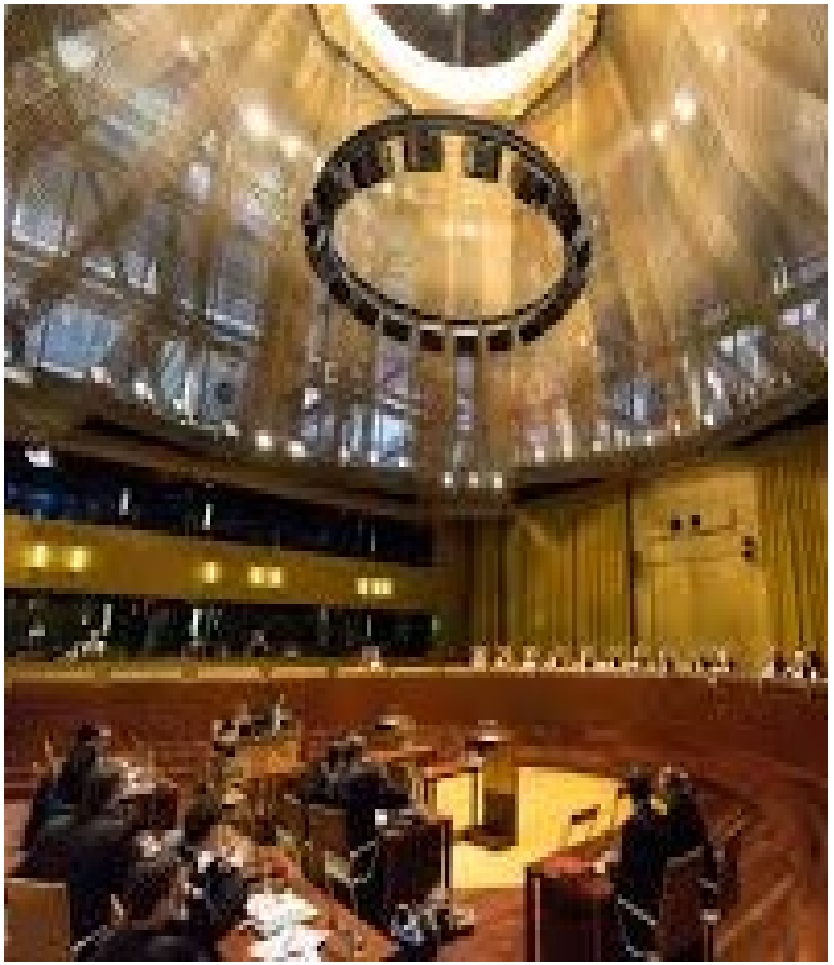
If the provisions of the ARD cannot be interpreted in either of the above ways, whether there is no transfer to any transferee of the rights and obligations under the employment contract?

Judgment

- The European Court of Justice (ECJ) rejected the second and third interpretations of the ARD and held that the first interpretation was the correct one.

- The ARD does not envisage a transfer involving multiple transferees. The court had to consider the objective of the ARD.

- The ARD is intended to safeguard the rights of employees on a change of employer by enabling them to continue to work for the new employer on the same terms and conditions that were in place with the old one.



What does this mean?

The ECJ has ruled that the employment contract of a transferring worker can be split between multiple transferees

The contract should be split in proportion to the tasks performed by the worker if possible unless this would adversely affect the workers' rights and working conditions

Transferees are likely to find the practicalities of following the ECJ's approach challenging

It may lead to a full-time employee becoming, post-transfer, a part-time employee with several different employers

How in practice would an employee split their time? How should issues such as annual leave entitlement be dealt with?

Can a dismissal for SOSR without any procedure be fair?

Potentially fair reasons for dismissal are capability; conduct; redundancy; contravention of a statutory duty or restriction; or, if none of these apply, 'some other substantial reason of a kind such as to justify the dismissal of an employee holding a position which the employee held'

Examples of dismissals that could be held to be for 'some other substantial reason' include:

- the dismissal and re-engagement of an employee to impose new contractual terms and conditions that the employee has refused to agree
- the dismissal of an employee where there are concerns about safeguarding children or vulnerable adults, but where the employer does not have grounds for a misconduct dismissal
- a dismissal because of a personality clash between employees that makes it impossible for them to work together
- The employer must act reasonably in dismissing the employee for that reason

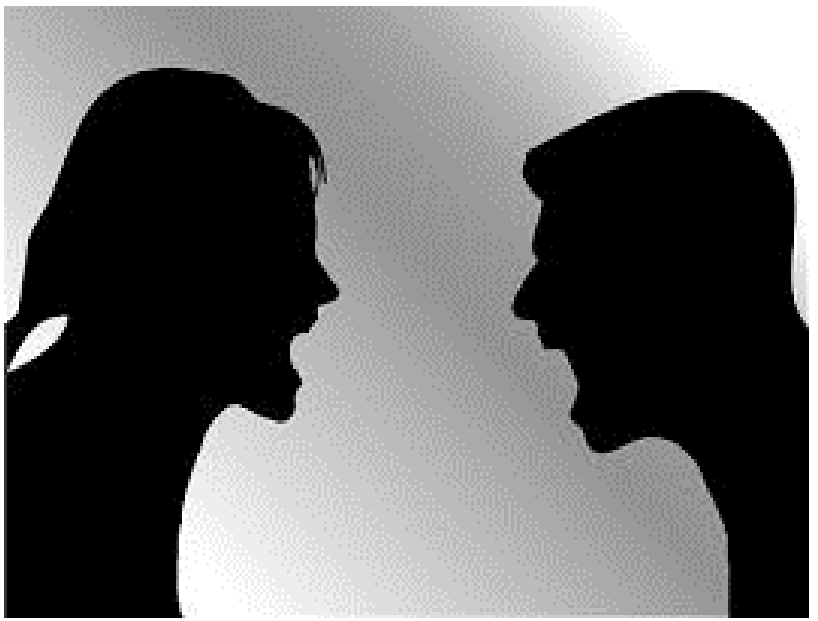
Gallacher v Abellio Scotrail (EAT)

Mrs Gallacher's relationship with her line manager soured after they argued about salary and recruitment

Despite meeting twice to discuss their relationship, both felt that the relationship had broken down irreparably

Abellio was trading at a loss and needed to act quickly. There were no signs the relationship could be repaired and no alternative roles for Mrs Gallacher

The line manager dismissed Mrs Gallacher, citing an irretrievable breakdown of working relations. There was no procedure, right of appeal but she did get nine week's notice



Judgment

The Tribunal rejected claims of unfair dismissal and discrimination. The ‘substantial reason’ was the lack of trust and confidence between two senior employees.

Usually, the lack of procedure would render the dismissal unfair. However, there had been an irretrievable breakdown in trust and confidence between two senior managers at a critical time for the business.

The circumstances did not naturally fit into any internal policy. Meeting again would serve no useful purpose.

The claimant was not interested in retrieving her relationship with her line manager. Any appeal would have been “going through the motions”.

The EAT agreed but warned that any dismissal without procedure should be approached with extreme caution.

What should you do?

Consider carefully before dispensing with dismissal procedures

In nearly all cases involving a dismissal you should follow at least a minimum procedure before dismissing

Here the employee concerned was senior, did not wish to repair the situation, and the business faced a critical position

This case does not open the door to dispense with a fair procedure before terminating employment

Had this employer followed a formal process it may have saved the time and cost of defending expensive tribunal proceedings

When might you be liable to pay an employee's wages whilst their unfair dismissal claim is waiting to be heard?

Interim relief is an order to continue paying salary pending the hearing and final decision

It is only available if the tribunal decides, at an interim hearing, that the claimant is likely to win at the full hearing

An employee may seek interim relief if the alleged reason (or principal reason) for the dismissal is one of the following automatically unfair reason:

- Union membership or activity
- Making a protected disclosure ('whistleblowing')
- Activities as a health and safety representative, a working time representative, a pension scheme trustee, or an employee representative for the purposes of collective redundancy or TUPE

The employee does not have to repay the money, even if they lose at the full hearing

Morales v Premier Fruits (Covent Garden) Limited (ET)

Premier Fruits proposed that staff take a 25% pay cut and one week's unpaid leave a month. A trade union lodged a grievance. After dismissing it, Premier dismissed Mr Morales, purportedly for refusing to consent to the reduction in wages.

Mr Morales claimed unfair dismissal for being a member of a trade union and whistleblowing.

The tribunal granted the application because the manager in question had shown strong hostility to trade union involvement in the grievance.

What should you do?

A successful application for interim relief will assist the (now unemployed) claimant to fund the ongoing litigation, and will put considerable pressure on the employer to settle earlier and for a larger sum than it may otherwise have done.

Awareness of the remedy is increasing.

The employee must show that they have a 'pretty good chance' of winning at a full hearing.

In addition to the possibility of a very costly sanction, employers have very limited time to prepare for the hearing. Applications for interim relief must be listed as soon as practicable, and often before the deadline for the ET3.

Exercise caution when dealing with an employee asserting one of the relevant claims during employment.

In defending a claim put your strongest possible argument on paper.

Discrimination – when can the requirement to reduce costs justify discrimination?

- *Heskett v Secretary of State for Justice*
- Age discrimination in the probation service
- Change in pay structure meant an increase of only one pay point each year rather than three points each year, depending on performance
- Younger employees disadvantaged as older employees were already nearer the top of the pay scale
- It would take 23 years to reach the top of the scale instead of potentially seven or eight
- That disadvantage would be unlawful unless it was a proportionate means of achieving a legitimate aim (the 'objective justification' defence)

Discrimination - When can the requirement to reduce costs justify discrimination? (2)

- A wish to save money cannot, on its own, amount to a legitimate aim capable of justifying indirect discrimination
- Cost considerations can only be taken into account along with other factors (the 'cost-plus' rule)
- The employment tribunal held the legitimate aim was to enable the probation service to meet its budgetary constraints (break even rather than go bust) in the aftermath of the 2008 financial crisis
- A range of measures had been introduced alongside this one and they had affected the different age groups of employees
- The probation service recognised the discriminatory effect of the policy and was working hard to negotiate an alternative with the union
- The Employment Appeal Tribunal and Court of Appeal upheld the cap on pay progression as a proportionate means of achieving its aim to balance its budget, not just save costs

Can you be expected as a reasonable adjustment to promise an employee that they will never have to work with certain colleagues again?

- *Hill v Lloyds Bank plc*
- Duty to make reasonable adjustments where a disabled employee is put at a substantial disadvantage by an employer's provision, criterion or practice (PCP).
- Whether the adjustment is reasonable depends on:
  - ➤ whether the adjustment would alleviate the disadvantage
  - ➤ the cost of the adjustment in light of the employer's financial resources
  - ➤ any disruption that the adjustment might have on the employer's activities

Can you be expected as a reasonable adjustment to promise an employee that they'll never have to work again with certain colleagues?

- The employee had 30 years' service for Lloyds Bank
- Absent with work related stress between July 2016 and October 2017
- A complaint of bullying by two colleagues was not upheld
- Said she had 'absolute dread and fear' of returning to work with these colleagues
- Requested a guarantee not to work with them and a redundancy package if in future she had to
- The Employment Appeal Tribunal upheld the tribunal decision that it would be a reasonable adjustment to give her this special benefit as a disabled person
- The adjustment would keep her at work by allowing her to work without fear

Is identifying a 'talent pool' of employees for future promotion discriminatory?

- *Ryan v Southwest Ambulance Service*
- The service identified a 'talent pool' from which it could fill leadership positions
- The pool had a disproportionately lower number of employees over the age of 55
- Ryan was not in the pool, which meant that she could not apply for a promotion
- The group disadvantage was that the employer was selecting employees from the talent pool, and not that it simply had a smaller number of older employees in it

What's coming in 2021?

- Holiday pay - do you only have to include voluntary overtime in the calculation of holiday pay if you promise it in the contract? East of England NHS Trust v Flowers
- Backdated holiday pay – will a three month break between holidays continue to prevent backdated claims? Chief Constable of the Police Service of Northern Ireland v Agnew
- Sleep-in shifts – do you have to pay national minimum wage for time spent asleep at work? Tomlinson-Blake v Mencap
- Contract changes – can you still agree these directly with employees if union negotiations break down? Kostal UK Limited v Dunkley
- Post-Brexit review of employment law will not go ahead as it is unpopular with Labour voters

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