INSIDE THIS ISSUE
THE INEQUALITY OF CUTS
SHARED SERVICES
EQUAL PAY - THE LAW CONTINUES TO DEVELOP
WHAT ARE THE TUPE RISKS IN RELATION TO SHARED SERVICES?
IS YOUR ORGANISATION ADDRESSING POOR PERFORMANCE?
PUBLIC SECTOR EQUALITY DUTY
FIXED-TERM CONTRACTS
ARE YOU PREPARED FOR THE AGENCY WORKERS REGULATIONS?
VOLUNTARY EARLY RELEASE SCHEMES

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Public Sector & Government News

THE INEQUALITY OF CUTS

A couple of recent judicial review decisions in England, associated with spending cuts, are worthy of note as the vast majority of public sector bodies seek to make cost savings.

R (Hajrula) v London Councils [2011] EWHC 151 (QB) 01/01/2011:
The Leaders' Committee of London Councils decided to cut £10m from their £26.4m Grants Scheme. However, a judicial review action in relation to that decision was brought by users of the services funded by the Grants Scheme.

The court held that the decisions taken were unlawful because of a failure to meet Public Sector Equality Duties. In particular, the judge held that there had been a failure to comply with legal requirements to pay due regard to Public Sector Equality Duties in the performance of functions, as required by Section 71 of the Race Relations Act 1976, Section 76A of the Sex Discrimination Act 1976 and Section 49A of the Disability Discrimination Act 1995 in relation to the decision taken to cut funds. The London Councils were ordered to undertake a lawful process of reconsideration in accordance with the Public Sector Equality Duties and the court stipulated that no funding was to be terminated until three months after conclusion of a "lawful consideration process".

The London Councils may still proceed, following an appropriate consultation process, to implement cuts on the same scale. It is worth noting that the judge did not accept arguments, put to the court, that he should quash the budget set by London Councils.

R (Luton Borough Council and others v Secretary of State for Education [2011] EWHC 217 (Admin) 11/02/2011:
Six local authorities in England were recently successful in judicial review proceedings brought in relation to withdrawal of funding for their Building Schools for the Future projects.

The judge ruled that the Education Secretary acted unlawfully in failing to consult with the authorities, including a failure to give due regard to the equality impacts, in relation to the effects of possible decision options on individual projects.

In a not dissimilar vein to the case mentioned previously, the judge ruled that the Education Secretary should now reconsider the decisions taken in relation to the projects covered by the action, including giving the authorities concerned reasonable opportunities to make representations and consider those representations in reaching his decision.

The judge did not find that the Education Secretary acted in breach of any substantive legitimate expectation.

In short - public bodies should take care to ensure that all decisions are taken only after due process has been followed, including compliance with Public Sector Equality Duties, active consideration of the impact of cuts on the people affected by them and consultation where necessary.

HAVE YOU ELIMINATED PRE-EMPLOYMENT HEALTH QUESTIONNAIRES?

We have advised a number of clients recently in relation to the changes brought in by the Equality Act 2010 on 1st October 2010. You will be aware that there is now a requirement that employers do not require candidates to answer questions relating to their health prior to the candidate getting to the stage of selection and/or interview. There are a number of exceptions to this and a number of ways that this can be managed.

SHARED SERVICES - GETTING SOME OF THE LEGAL HURDLES INTO PERSPECTIVE

The Report of Scotland's Independent Budget Review Panel in July 2010 suggested that, in the short term, the Scottish Government should encourage progressive changes and joint action between public bodies to produce new and more effective service delivery models.

In many parts of the public sector, in addition to difficult decisions about the extent of service provision, considerable efforts are being made to adopt a collaborative approach. Sometimes it is said that public procurement represents a major legal barrier to shared services arrangements and here we outline why that need not necessarily be the case.

Types of Public Sector Collaboration

There are a number of types of public sector collaboration, some of which are not new. In particular, joint boards have been in place for a number of years and allow collaboration by local authorities across areas.

The European Commission recently published a Green Paper on a modernisation of public procurement and submissions are openly invited before 18th April 2011. In relation to what it terms "public-public co-operation", it identifies three types of arrangement falling outside the public procurement regime. The first is "in-house contracts" and these are discussed below. The second is described as "horizontal co-operation" and again we explain what this means below. The third, which should also be borne in mind, is "transfer of competence" from one public authority to another but, as the Commission points out, this is not co-operation in the strict sense.

At this point, it is important to remember that public procurement rules do not set down rules for, or interfere with, the rights of public bodies to use their own resources to carry out their functions. Instead, public procurement requirements are engaged when authorities look to have activities performed by someone else on their behalf in a way which should benefit from competition between contractors.

Teckal and In-House Exemption

Back in November 1999 the European Court considered the case of *Teckal v AGAC*, where a number of local authorities conferred responsibility for managing energy and environmental services to a consortium which they had established, without having gone out to public procurement. Since the authorities exercised over the person concerned a control which was similar to that exercised over their own departments and that person carried out the essential part of its activities with the controlling authority or authorities, the arrangement was held to be akin to an in-house contract award and so was exempt from public procurement. In such circumstances, failure to go out to tender does not undermine the principles of free competition and transparency because in effect the authority is obtaining what it needs from its own resources. According to the European Commission in its Green Paper, if such in-house providers have a "market orientation", this might also give rise to competition and state aid concerns. So, in addition to the control test and the need for the essential part of the entities activities being carried

out with the controlling bodies, there is a limit to the extent to which such bodies may go out and compete commercially for business in other areas.

There have been a number of other cases which expand on the requirements for such in-house bodies and it is worth noting that such an in-house arrangement will not benefit from a public procurement exemption in circumstances where its capital comes partly from the private sector. Such entities must be established only using public sector financing.

Governance Requirements

It is also worth noting that in addition to paying close attention to public procurement requirements, in-house arrangements will also need clarity in legal and governance terms, both in terms of day to day accountability and also in respect of a host of operational and regulatory considerations that may apply. That said, there is now a considerable body of expertise for the public sector to draw upon when dealing with these issues.

Administrative Co-operation - "Horizontal Co-operation"

On a practical level, it is not always possible or desirable for authorities to exercise control over arrangements and shared services entities in the same way as a Teckal style arrangement requires. In the Hamburg waste case, a series of contracts between the city of Hamburg and four neighbouring authorities arranged for collaboration over waste treatment and disposal, centred on a waste incinerator plant which was under construction. The European Court found that the arrangement established "administrative co-operation", on the basis of give and take with the aim of achieving objectives through "mutuality". The local authorities co-operated with the aim of ensuring that the public task that they all had to perform, namely waste disposal, was carried out. The Court commented that nothing in the papers provided to it indicated that the authorities were trying to avoid application of public procurement rules. It is important to appreciate, however, that the nature of the co-operation in this case was closely scrutinised and was found to be non-commercial in nature. According to the Commission in its Green Paper, "joint performance by solely public entities of a public task, using own resources, having a common aim and involving mutual rights and obligations going beyond "performance of a task against remuneration" in the pursuit of objective in the public interest," is not covered by the public procurement rules.

Comment

Given the limits of public procurement and the continuing responsibility of public entities to decide themselves how to go about performing their responsibilities, using their own resources, this is a less surprising case. It is possible to see how the principles of administrative co-operation at the heart of the Hamburg waste case could be used to achieve robust shared services in Scotland and elsewhere.

Although with care public procurement concerns need not create a difficulty for such administrative co-operation, as with Teckal style arrangements it is still important to address a number of legal and governance issues, such as those mentioned elsewhere in this newsletter.

EQUAL PAY - THE LAW CONTINUES TO DEVELOP…

EMPLOYMENT LAW SEMINARS

Our spring 2011 Employment Law seminars will take place on Tuesday 10 May in Glasgow & Wednesday 11 May in Edinburgh. Full details will be sent out in due course and booking facilities will appear online at www.macroberts.com/macrobertsevents

There have been two recent significant decisions in the field of equal pay. The Employment Appeal Tribunal (EAT) has recently found in favour of Perth & Kinross and Dundee City Councils in a joint appeal in which MacRoberts LLP acted.

The issue was whether a Claimant can change the comparators on which she relies between raising her grievance with her employer and submitting an equal pay claim to the Employment Tribunal. The EAT concluded that where different or additional comparators are identified in the Tribunal claim, the complaints identified in the grievance and Tribunal claim may not be "essentially the same." If so, the claim should be restricted to those comparisons where there is the necessary correlation between the grievance and Tribunal claim. This decision potentially affects thousands of equal pay claims across the UK. The Claimants have indicated an intention to seek leave to appeal.

Meanwhile, the Court of Session has found in favour of Dumfries & Galloway Claimants in posts such as school Council in its argument that female Classroom Assistants, Support for Learning Assistants and Nursery Nurses were not in the same employment as their manual worker comparators, as required in order to pursue a claim under the Equal Pay Act. It is understood that the Claimants have appealed to the Supreme Court.

An appeal by the City of Edinburgh Council on the same issue, but including an additional argument under European law is listed to be heard by the Court of Session in June 2011.

WHAT ARE THE TUPE RISKS IN RELATION TO SHARED SERVICES?

Most local authorities are considering new ways to deliver services on a more efficient and cost-effective basis given the budget cuts.

We have advised a number of clients on the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") implications of various New Delivery Models. These have included traditional out sourcing, the creation of ALEOs and various forms of shared service delivery. It is relatively easy to apply TUPE to any particular proposed model and in many cases TUPE has no application. However, the risks of getting it wrong are great. For example, if it transpires that there has been a TUPE transfer, but there has been no consultation in advance of the TUPE transfer, then each employee affected may be entitled to a protective award amounting to thirteen weeks' pay uncapped.

Some local authorities have traditionally used long-term secondments to deal with changes in service delivery. However this method may be a trap for the unwary. If employees are "seconded" but in reality it is a permanent transfer of a service from one "establishment" to another then TUPE may apply.

MacRoberts publishes regular e-updates regarding various aspects of corporate and commercial law. If you would like to receive, free of charge, a copy of any of these publications, please register for the topics of interest to you by logging on to www.macroberts.com/e-updates

IS YOUR ORGANISATION ADDRESSING POOR PERFORMANCE?

Given the stark choices ahead for many local authorities, we are increasingly being asked to look at the issue of capability. There is a widespread view that it is very difficult to terminate the employment of an employee due to lack of capability in their role.

MacRoberts acted for a local authority in one of the only cases that has been heard at Tribunal in Scotland where a teacher had her employment terminated by reason of lack of capability. The Tribunal found that there was a fair dismissal.

PUBLIC SECTOR EQUALITY DUTY - 6 APRIL 2011

This duty will come into force on 6th April 2011 and it applies to public authorities and others carrying out public functions. A public function is defined as a function of a public nature for the purposes of the Human Rights Act 1998. The duty ensures that, when carrying out their functions, public bodies should have regard to discrimination and equality issues.

A public authority should have regard to the need to:

- eliminate discrimination, harassment, victimisation and any other prohibited conduct;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it and;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

It is vital that the organisation understands the principles and the scope of the Equality Duty. We have been helping clients understand this new area of law and how they can comply with it to ensure that they don't fall short of the provisions and find that they are subject to the various enforcement measures.

SURELY THERE CAN BE NO RISK IN LETTING FIXED-TERM CONTRACTS END?

Fixed-term contracts have been useful especially when there are funding issues in relation to certain posts. However, the advantage of fixed-term appointments has been reduced over time, most notably by the implementation of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

It has always been the case that the expiry of a fixed-term contract is in law a dismissal. The implication for this has recently hit home in Scotland in relation to a situation where a number of fixed-term contracts are brought to an end. The University of Stirling brought one hundred or so fixed-term contracts to an end and then faced a claim raised by the Union for protective awards amounting to thirteen weeks' pay uncapped for each of the affected employees. Their claim was that the wide interpretation of the obligations in relation to collective redundancy applied such that there should have been collective consultation in relation to the proposed expiry of the fixed-term contracts. As you will know, where twenty or more employees are at risk of "redundancy" in any 90 day period at one establishment, then the collective consultation obligations kick in. However "redundancy" in this context is much wider than the colloquial meaning of "redundancy." The Employment Tribunal found against the University.

The above decision came after the case of *Lancaster University v The University and College Union*. In this case the EAT upheld the original Tribunal's decision to make a protective award for the University's failure to collectively consult in relation to the expiry of a number of fixed-term contracts. Even though the employees were not awarded the maximum 90 days pay, they were still awarded 60 days pay, and this was only because the Union had "effectively condoned" the failure to collectively consult over a number of years. This case illustrates that the failure to collectively consult can result in high penalties for the employer.

More generally, we regularly assist clients with their collective consultation in relation to changes to terms and conditions and redundancies. Often the consultation is not difficult to manage in comparison to the handling of the press and threats of lawful (and unlawful) industrial action.

ARE YOU PREPARED FOR THE AGENCY WORKERS REGULATIONS?

The use of agency workers has been widespread and their flexibility useful to employers. However, with the implementation of the Agency Workers Regulations which will come into force on 1st October 2011, there are some dangers that must be considered.

It will be the case that after 12 weeks in employment an agency worker ought to be employed on comparable terms to an employee who is carrying out the same work. We have advised a number of clients in relation to this issue and in particular about reviewing certain posts at present in order that there will be no difficulty in relation to such comparison when the Agency Regulations come into force.

We are running two briefings on The Agency Workers Regulations on 23 and 24 March in Glasgow and Edinburgh respectively.

To register a place at this briefing please e-mail marketing@macroberts.com or register online at www.macroberts.com/macrobertsevents

TAKING THE "STRAIN" OUT OF VOLUNTARY EARLY RELEASE SCHEMES

We have advised a number of clients in relation to voluntary early release schemes. The starting point is whether or not the scheme bands are discriminatory based on, for example, age or sex. Furthermore, if the employees are members of a public sector pension scheme (e.g. the local government pension scheme), it may well be that there are very significant "strain in fund" costs payable in the event of the employee leaving on a voluntary early release basis.

We have worked with a number of clients in order to set up a series of "gates" to the application process, such that the exit will not be agreed if the strain in fund cost would be excessive. Furthermore, working with our Pensions and Employee Benefits specialists at MacRoberts, we have tailored Compromise Agreements with appropriate indemnities in order to accommodate these issues.

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