In Brief – UK Employment and HR Newsletter

Talkback

In this summer issue of our employment and HR newsletter, we have reviewed recent case law. We summarise the key facts in bite size chunks and highlight how and why the cases are of interest to HR and those with responsibility for employment issues in the workplace.

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Contractual Matters

Failure to obey instructions justified dismissal for gross misconduct

In *Dunn v AAH Limited,* the Court of Appeal held that an employer was entitled to dismiss two company directors because their actions in failing to report evidence of serious fraud against their employer was a repudiatory breach of the implied duty of trust and confidence.

The two directors of the UK subsidiary had been instructed to report all risks that could impact profit to the parent company. The UK subsidiary subsequently lost £26 million because of fraud committed by one of its suppliers and the directors only notified the parent company some five months later.

Point of Interest: It is unusual for an employer to cite a breach of the implied duty of trust and confidence against an employee. However, even though the facts are relatively extreme, it may be a useful decision for the employer when considering how best to deal with issues at board level and director performance.

Team moves & constructive dismissal

In *Tullett Prebon v BGC Brokers LP,* the High Court held that BGC had conspired with former senior employees of Tullett to poach teams of brokers and induce them to breach their contracts. Tullett employees were targeted and offered more than £40 million in signing on bonuses and fixed term contracts to move to BGC. The arguments by individual brokers that they were no longer bound by their existing contracts of employment as BGC had breached the implied duty of trust and confidence were unsuccessful.

Point of Interest: Unique features of the broking world may mean that the general lessons to be learned from this case are relatively limited but it does serve as a good illustration of the tactics and strategy that more aggressive competitors may adopt and should prompt the employer to consider if the organisation's top talent are on suitably worded contracts of employment which protect the legitimate business interests of the organisation both during and after termination.

No ability to unilaterally alter

Mrs Greenland's contract of employment provided that she was entitled to commission of up to 100% of salary if she made sales targets and additional commission if she exceeded the targets. It also stated that GX Networks Limited could alter the amount of her commission by altering the targets or if the sales director exercised his discretion to cap the commission at 100% of salary by exception only. Mrs Greenland's targets were reviewed upwards and the sales director capped the commission. In *Greenland v GX Networks Limited,* Mrs Greenland made a claim in the high court for non-payment. The Court of Appeal held that she was entitled to the additional commission. It said the employer had failed to consult with her about the change in targets when this was part of the scheme and it could not be said that there were any 'exceptional' circumstances which justified a cap.

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Point of Interest: We all know that bonus and commission schemes are useful tools to incentivise employees, particularly in a sales function but these types of schemes need to be fully costed and worked through prior to implementation. In Mrs Greenland's case, the company set the targets too low. Therefore, the employer needs to ensure that the rules of the schemes are well-drafted, the targets set are challenging and appropriate and that if any alterations are made to the scheme or the amount payable it assists the business to avoid a breach of the implied duty of trust and confidence.

Claims for loss of future employment prospects

In *Edwards v Chesterfield Royal Hospital,* the Court of Appeal held that a doctor who was summarily dismissed after disciplinary proceedings conducted in breach of a contractual disciplinary procedure could recover damages for loss of professional status.

Point of Interest: The House of Lords decisions, *Johnson v Unisys and Eastwood & Anor v Magnox Electric Plc*, held that an employee could not rely on the implied duty of trust and confidence to claim damages for the manner of dismissal at common law, and that a distinction should be drawn between events leading up to the dismissal, in respect of which a common law breach of contract claim may be brought, and the dismissal itself, for which the remedy is a statutory claim for unfair dismissal. In this case, the court held that damages were not limited to notice pay or to the time it would have taken for a contractually compliant disciplinary procedure to have been carried out.

12 months non-solicitation unenforceable

Mr Abbassi was employed as an account executive for AFEX. His job was to buy and sell foreign currency from and to new and existing clients. He had an annual salary of £35,000 and earned annual commission of approximately £100,000. His contract of employment contained a garden leave clause, a 12 months non-solicitation clause and a 6 months non-dealing clause. Any period spent on garden leave would be off-set against the period of the post-termination restriction. Mr. Abbassi resigned to go to a competitor, IFX, and he was placed on garden leave. In *AAFEX v IFX*, AFEX applied for an injunction to prevent him from starting work. The High Court refused to grant the injunction. It held that the non-solicitation clause was likely to be unenforceable as it went beyond what is reasonably necessary for the protection of AFEX's legitimate interests.

Point of Interest: It can sometimes be tempting for an employer to seek to impose lengthy post-termination restrictions on an employee. This case illustrates that this is not appropriate for all employees. It was significant here that Mr Abbassi had a 6 month non-dealing clause which was not the subject of the injunction, that he was not senior within the organisation, the pricing information and the foreign currency market changed rapidly over time, that there were only a small number of foreign currency clients in the market and that he was not involved in pivotal or significant projects.

HR's letters means bankers entitled to bring claims for full discretionary bonuses

In 2009, Dresdner cut the 2008 discretionary bonuses notified to most of its investment bankers by 90%. The bankers issued proceedings in the High Court in *Attrill and others v Dresdner Kleinwort Limited and Commerzbank AG,* for the full payment. They alleged that they had a contractual entitlement to the monies arising from: (i) the CEO's announcement at a 'Town Hall' meeting at which he said that there would be a guaranteed bonus pool of 400 million euros for staff bonuses; and/or (ii) letters sent by HR to them stating that their discretionary bonus of a particular amount had been provisionally awarded, even though such letters included a condition that the payment was subject to a reduction of 90% if there was a material deviation in profit. The bank claimed that the bankers' claims had no reasonable prospect of success as the bonuses were cut as a result of the banking crisis. Although the High Court held that the Town Hall announcement was not binding as it was too vague, it did hold that the letters from HR could be enforceable. Therefore, the bankers were able to continue with their claims.

Point of Interest: The above case was an application by Dresdner to get the bankers' claims thrown-out at an interim stage. Therefore, as yet, we do not know if the carve out in the letters from HR will be sufficient to justify the 90% cut in bonus. Clearly, any figure put in writing around bonus time is likely to give rise to a reasonable expectation. Therefore, any caveats should be built into the bonus rules at the outset as reliance upon newly created conditions is likely to be subject to legal challenge.

Unfair Dismissal

Informal action means dismissal unfair

In *Sameer Sarkar v West London*

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Mental Health NHS Trust, the Court of Appeal has upheld an employment tribunal decision that where an employer had initially used an informal procedure which was designated for fairly low level misconduct, the subsequent abandoning of that procedure and dismissal for gross misconduct was unfair as it was not within the range of reasonable responses.

Mr Sarkar was a consultant psychiatrist. Complaints were raised about his treatment of colleagues. The NHS Trust implemented its Fair Blame Policy under which the most serious sanction was a written warning. The procedure broke down and Mr Sarkar was sacked for gross misconduct. The Court of Appeal took the view that it was inconsistent with the Trust's decision to use the Fair Blame Policy.

Point of Interest: This is an interesting case in light of the emphasis placed on informal action in the ACAS Code of Practice on Disciplinary and Grievance Procedures. The employer should be mindful of the risks attached from taking informal action to resolve a dispute or workplace issue and ensure that it has reserved the right to implement the full range of sanctions when considering the actions of the employee even at the investigation stage.

Thorough investigations and how to deal with conflicts in evidence

A Filippino nurse dismissed for alleged patient abuse successfully made a claim for unfair dismissal in *Salford NHS Trust v Roldan,* as the Court of Appeal held that inconsistencies in evidence against the nurse should have been explored more thoroughly and more evidence taken. The Court also made some interesting points: when assessing the reasonableness of an investigation, tribunals should consider the gravity of the consequences of dismissal on the employee; when the allegation against the employee is serious, the investigator must be even-handed in looking for evidence favouring the accused, as well as against; and where there is a conflict of evidence which cannot be resolved, an employer should give the alleged wrong-doer the benefit of the doubt.

Point of interest: It is always important to conduct a thorough investigation and to make proper notes throughout. If an issue arises, it must be followed up. Further, the case is also interesting for the guidance from the Court on how to deal with "diametrically conflicting" evidence where there is no corroboration one way or the other. The duty on employers is to "form a genuine belief on reasonable grounds that the misconduct has occurred". The employer is not obliged to believe one employee or another. Therefore, it is a judgment call for the decision-maker and, in some circumstances, it is acceptable for an employer to find that a case has not been proved even if they believe the complainant.

Conditional resignations do not work

On 29 August 2008 Mr Heaven sent a letter of resignation to his employer Whitbread in which he said that he was resigning conditional upon being paid in lieu of his one month notice period and receiving a 'glowing' reference. Whitbread wrote back to Mr Heaven and said it could not accept his resignation. It said that Mr Heaven had to indicate if he was resigning or not. On 3 September 2008, Mr Heaven confirmed he was resigning with effect from 29 August 2008. Whitbread then accepted his resignation. There was then a dispute as to the effective date of termination. In *Heaven v Whitbread Group plc,* the EAT held that the date of termination was 3 September 2008. It said that the effective statutory date of termination depends upon what happens between the parties, not what they have agreed.

Point of Interest: Whitbread acted wisely here. Whilst most situations can be resolved if the parties agree, a Tribunal will not allow the employer and the employee to backdate resignations. If you receive a vague or conditional letter of resignation, you should write to clarify the date and terms as soon as possible.

Discrimination

Requirement of a degree not age discrimination

In *Homer v Chief Constable of West Yorkshire,* the Court of Appeal has held that it was not indirect age discrimination to have a requirement that an employee have a law degree in order to be a higher grade which was better paid. Mr Homer was 61 years of age and a legal adviser. He did not have a law degree. When he applied to be re-graded for a role which required the job holder to have a law degree he was unsuccessful. He claimed indirect age discrimination on the grounds that if he studied for a law degree part-time he would not complete the course until he was 65 years of age when he planned to retire. Therefore, he argued that the requirement was a 'provision, criterion or practice' that placed him and those aged 60 to 65 at a particular disadvantage which was not justified. The Court of Appeal said no, the particular disadvantages of less pay and a lower grade resulted from age not age discrimination. In effect, they resulted from the fact that he intended to retire.

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Point of Interest: This is the first occasion on which an appeal in relation to age discrimination claim has been considered by a Court of Appeal. The decision will undoubtedly be welcomed by those who have responsibility for recruitment given its obvious impact on job adverts and role requirements. However, the employer needs to be aware that the decision leaves open some further arguments such as whether those in an older age group are less likely to have a degree and the ambit of any justification.

Dismissal of Christian not religious discrimination

In *McFarlane v Relate Avon Limited*, the Court of Appeal has refused permission to appeal by a Christian counsellor against his dismissal by Relate for failing to give an unequivocal commitment to counsel same-sex couples. It held that he was not unfairly dismissed or the victim of direct or indirect discrimination on the grounds of religion or belief.

Point of Interest: The Court of Appeal said it was bound by the recent decision of Ladele[19] which held that it was not discriminatory for a council to sack a Christian registrar who refused to perform civil partnership ceremonies for religious reasons. The case illustrates how an employee who fails to comply with an equal opportunities policy can be fairly dismissed and an employer should deal with the need to balance competing and sometimes conflicting statutory duties.

Reasonable DDA adjustment to swap jobs

PC Jelic suffered from anxiety syndrome so he was placed in a role with limited public contact, but was later retired on medical grounds when this contact was increased. In *Chief Constable of South Yorkshire Police v Jelic,* the EAT held that a reasonable adjustment for his disability could have been to swap roles with another PC who had no public contact. The EAT agreed and held that swapping a disabled employee's role with a non-disabled employee's role was a reasonable adjustment in the circumstances.

Point of interest: This case may at first appear to be an alarming extension of an employer's duty to make reasonable adjustments but the judgment is likely to be case-specific given the special nature of service in the police force. Whilst the EAT accepted that swapping jobs in this way would not be a reasonable adjustment in all cases, the duty under the DDA is already extensive and specific legal advice is recommended.

What does an employee have to prove if s/he alleges she has a mental impairment?

J successfully applied for a job at DLA. Prior to starting work, DLA withdrew the job offer. In *J v DLA Piper UK LLP*, J claimed that the offer was withdrawn as a result of her disclosing her medical history of depression. DLA Piper claimed it was withdrawn due to a recruitment freeze. J brought a claim of disability discrimination. Although the substantive claim is yet to be determined, the EAT was asked to consider the approach taken by the Tribunal to the issue of whether J was disabled within the meaning of the DDA. The EAT held that the correct approach when dealing with claimants who allege that they are depressed is to determine the effect of the condition on the normal day-to-day activities. It needs to determine if s/he has clinical depression or a reaction to difficult circumstances or stress producing similar symptoms as only the former qualifies as a disability. Further, that a GP's evidence should have been given due consideration even though they are not specialists

Point of Interest: Trying to find the appropriate way to deal with employees or applicants with mental illness is not easy particularly if there is a long term history of depression.

It used to be that a mental "impairment" had to be 'clinically well recognised' but this was repealed in 2005. The case illustrates that you cannot be too formulaic in trying to determine the issue. The risk for HR is that once you are on notice of a potential disability as here, you need to have clear objective evidence to prove that you have not treated the applicant or employee differently by reason of their disability.

Other Statutory Matters

A protected disclosure can be made before employed

In *BP plc v Elstone,* the EAT held that a worker has the protection of the whistleblowing legislation even if the protected disclosure in question was made to his or her previous employer. In a very literal interpretation of the legislation, the EAT took the view that provided the 'worker' was employed by someone at the time of the protected disclosure, this was sufficient to satisfy the test set out in the Employment Rights Act 1996.

Point of Interest: It seems unfair that a new employer is at risk for actions which pre-date their employment or engagement of the worker but it is a reminder of the importance of having a robust recruitment process for all staff and ensuring the business sticks to that

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process. If BP had checked why Mr Elstone left his previous company before hiring him it may have been aware of the issue. It may also have avoided any potential liability as it is not unlawful to refuse to employ someone if they have made a protected disclosure to their previous employer but it is unlawful to subject them to a detriment because of such disclosure once they are a worker.

No requirement to advise on whether settlement a 'good deal'

After Glasgow City Council settled equal pay claims with over 10,000 employees, some employees then tried to breach their compromise agreements by claiming against the Council. In, *McWilliam & Others v Glasgow City Council,* the employees argued that they were not bound by the compromise agreements as they had not been sufficiently independently advised and they have not raised their claims with the Council or the Tribunal. The EAT held that the agreements were valid. It said that an employee has to be advised on the "terms and effect" of a compromise agreement, not on whether the settlement proposed was a "good deal". Generic advice given in group presentations, could form part of that advice even where it was given by a panel solicitor who did not sign-off the agreement. This case is likely to be appealed.

Point of Interest: Although only an Employment Tribunal decision, this case is worth noting as it is the first based on the requirements for a valid compromise agreement under sex discrimination legislation. Whilst the validity of the employees' compromise agreements were upheld, a claim of this nature may have been avoided if the legal advice was or was perceived to be more clearly independent in the first place.

£ 10,000 penalty for breach of ICE Regs.

In *Darnton v Bournemouth University,* the "EAT" has handed down a decision that a breach of the Information and Consultation of Employees Regulations 2004 (the "ICE Regulations") should cost the employer £10,000.

Mr Darton made a request under Regulation 7 of the ICE Regulations which triggered the procedure for the negotiation of an Information and Consultation Agreement. Although the University operated the procedure, obtained legal advice and subsequently put an Information and Consultation Agreement in place, it got the date of the original request by Mr Darton wrong and it was held to be in breach.

Point of Interest: This is only the second decision where a penalty has been fixed under the ICE Regulations. It illustrates that when dealing with statutory timetables it is better for the employer to err on the side of caution as even minor mistakes can be costly.

Quick Fire Jurisdictional & Territorial Conundrums…. An employee living in the UK but working every other month in Libya was entitled to bring an unfair dismissal claim. An individual can be resident in more than one place at the same time and so have the benefit of the discrimination legislation which only protects applicants/employees who are 'ordinarily resident in Great Britain'.

On a lighter note…Weight Watchers came off worse in its 'weigh-in' with HMRC this month. Weight Watchers had claimed that its group meeting leaders were self-employed but the Tax Tribunal held that in fact the leaders were employees. The weight loss is reported to be in the region of £23 million in PAYE and national insurance contributions.

Whoops-a-daisy…A female firearms officer has been awarded £575,000 in damages for sexual discrimination. The tribunal found that her male colleague made comments about her breasts and called her a 'lipstick', a 'whoopsy' and a 'daisy'. ■

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