Re-Engagement Takes Centre Stage

The recent case of *Manchester College v Hazel and Another UKEAT/0642/11* saw the Employment Appeal Tribunal make an order for re-engagement for the Claimants, and uphold a finding of automatic unfair dismissal following a TUPE transfer.

In this case two employees (out of 1,500) were dismissed following a TUPE transfer for failing to agree new terms and conditions of employment which included a pay cut. The new terms and conditions of employment were proposed to employees at the same time as the transferee made 200 redundancies. The transferee explained that those staff who remained with the College at the end of the redundancy process would need to sign up to these new terms and conditions or further cuts may be necessary. It appears that the College completed the redundancy process and then negotiated with the remaining staff about the new terms and conditions of employment. Therefore, at the time when the two Claimants were considering these new terms and conditions of employment, they knew that they were no longer at risk of redundancy. The two employees refused to accept the new terms and conditions of employment and were dismissed. Following their dismissal they were again offered the new terms and conditions of employment. They accepted these new terms and conditions of employment but brought a claim for unfair dismissal in relation to their termination of their old contracts, arguing it was for a TUPE related reason.

What is an ETO Reason?

The College argued that the reason for their dismissals was an economic, technical or organisational reason (an "ETO reason") entailing a change in the workforce. The key question was whether the ETO reason did entail changes in the workforce. Only if the ETO reason entailed a change in the workforce could the College avoid liability for unfair dismissal. Case law suggests that a change in the workforce means either a change to the numbers that are employed or the functions of those employed. The tribunal said that neither aspect applied here. The redundancy exercise had been completed before the new terms and conditions were offered to the Claimants. Therefore, there was no proposed change to numbers and no suggested change to the employees' functions when these employees were dismissed. Consequently the tribunal held that the dismissals were automatically unfair and the EAT agreed.

Why was re-engagement possible?

When there is a finding of unfair dismissal, and if requested to do so by the Claimants, the tribunal must consider whether a re-engagement or re-instatement order is practical. In this case, the tribunal made the unusual order that the employees should be re-engaged by the College. The tribunal thought up an innovative solution which confirmed re-engagement on the new terms and conditions of employment, with the exception of the rate of pay, which was to be restored to the old rate of pay. The rate of pay was then to be frozen until their colleagues had caught up with the pay rates.

There were factual elements to this case which made re-engagement a possibility. The Claimants were still working for the new employer so there could be no question about a lack of trust and confidence on the employer's part in being forced to take back former employees who had taken proceedings against it. This is a common argument used by an employer to suggest that re-engagement is not feasible. Secondly the tribunal felt that the re-engagement would be simple to achieve as the two employees could stay on their new terms and conditions save in relation to pay. Therefore, the re-engagement would simply involve the College giving an instruction to payroll to change the rate of pay back to the old rate of pay. Thirdly, the new employer's witnesses had given evidence that they were confident they could handle the other 1,500 employees, who had signed up to the new terms and conditions with the lower rate of pay, and who, understandably, might be unhappy that their colleagues had been re-engaged on a higher pay level. These witnesses

confirmed that they had already handled very difficult negotiations with the unions in relation to the changes to terms and conditions of all of these employees so felt that they could deal with two employees returning on the old rates of pay. Also, the old rates of pay were only to be restored for a fixed period until June 2012 and at that point there could be a renegotiation for all employees. The EAT were impressed with the practical solution applied by the tribunal and upheld the reengagement order.

Practical implications where there has been a TUPE transfer

Harmonisation exercises, following a TUPE transfer have always been difficult in theory. This case could see them become difficult in practice too. If this case becomes well-known to Claimants and their lawyers, employers may well find that their ability to introduce detrimental changes is undermined. Employees could oppose the changes, reluctantly sign up to a new contract of employment and pursue the re-engagement option, particularly if the employees were confident of being able to show that their original dismissals were not for an ETO reason, because there were no changes in the workforce. If the new employer is running a redundancy process at the same time as changing the terms and conditions of employment then it may be possible to link the two, so that there is a proper ETO reason for the change. However, in our experience it is relatively rare for an employer to seek to run both programmes at the same time.

Practical implications where there is no TUPE transfer

However, the case has wider ramifications in circumstances where there has been no TUPE transfer. In general terms it is easier for an employer to show that the dismissals are fair, as part of a re-contracting exercise, where there is no TUPE transfer. It is not necessary for the employer to demonstrate that the dismissals were for an ETO reason. However, the dismissals can still be unfair on ordinary unfair dismissal principles. Here employees who consider they are unfairly dismissed would have the same opportunity to apply for re-engagement and the same likelihood of succeeding. Indeed, more employees might be tempted to refuse to agree the changes voluntarily, so forcing the employer into a situation where it has to decide to dismiss a greater number of staff, with the corresponding downside of the possibility of more unfair dismissal claims.

Changing terms and conditions generally

In our view re-engagement orders are still likely to be rare, and very fact specific, but if they are seen more often in the context of a general re-contracting exercise, then the financial implications for the employer could be significant. The re-engagement order could unravel some of the new terms and conditions which were a key point of the re-contracting exercise in the first place, and therefore strike a real body blow at the employer. If the employer simply decides to ignore the re-engagement order (which it is permitted to do) the Tribunal can award enhanced additional compensation on top of ordinary unfair dismissal compensation. This could make the unfair dismissal award a costly one for the employer.

One of the factors which counted against the College here was that only two out of 1,500 employees had sought re-engagement. Therefore, ironically, the smaller the percentage of employees who refuse to accept the changes, the greater the likelihood that the tribunal could order re-engagement as a practical option, given that the likely impact of such an order would be limited.

It makes sense, therefore, for the detailed economic arguments of the re-contracting exercise to be clear at all stages. Witnesses for an employer need to be able to answer clearly and with confidence about the economic need for the re-contracting exercise, and also the impact on the existing workforce if re-engagement order were to be made.

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