"It's the contract, stupid!"

At this time of year, it is natural to look back and take stock of the last 12 months, and employment lawyers are no different. Looking back over 2012, we have noticed a clear trend from the cases which emphasise the ability of employer and employee to set the terms by which they will agree to work together. But as the tag line goes, with great power comes great responsibility, and the counter-part to this freedom is that the Courts have shown that they will not necessarily come to the aid of a party who has made a bad or unexpected bargain.

We have drawn together some of the most important contractual decisions to come out in 2012 which emphasise areas where employers should review their current contracts and also be aware of potential traps. We thought it would be helpful for employers to have a checklist of points coming out of the recent cases, when reviewing drafting in their contracts or procedure around the issuing of new contracts.

We have covered a number of these matters either in previous legal updates or in the employment podcast (The view from Mayer Brown – available via iTunes). Accordingly, the summary of the various cases below is very short and we would be happy to provide more information on any of the cases mentioned below.

1. Is the employee obliged to report wrongdoing to the employer?

The recent Court of Appeal case of *Ranson v Customer Services PLC* established that where an employee is not also a director, that employee will not be subject to a duty of fidelity or a duty to report his own breach of the contract, unless this is expressly stated in the contract or it is permissible to imply such terms and these implied duties would be consistent with the express contract terms.

Therefore, for employees at a senior level, contracts should contain express reporting obligations on the employee to report matters which are of concern to the employer, or the employer should impose a contractual duty equivalent to a fiduciary duty.

2. Can the employer dismiss for incapacity, notwithstanding PHI?

Previously, the Courts have appeared relatively willing to imply a term that an employer will not terminate the employment contract where the employee was incapacitated and could qualify for payments under the employer's permanent health insurance (PHI) policy. In *Lloyd v BCQ Ltd*, the Court held that since the contract did not refer to the PHI benefit, the contract contained an 'entire agreement' clause and reserved an express right for the employer to terminate in circumstances of incapacity, there was no scope for implying such a term because the implied term would contradict the express terms.

The case emphasises that the employer is able to choose the terms on which it is willing to offer a PHI benefit. Naturally, an employer can agree, as a matter of contract, that it will be bound not to dismiss an employee who is expected to qualify for the benefit unless there are specific reasons. Equally, however, an employer can provide that the benefit is discretionary and it does not accept any ongoing obligation to retain an individual in employment merely because they have an expectation of going into the PHI scheme. Employers have an ability (subject to statutory rules, of course) to specify the terms of the employment bargain, and we suggest employers look to review their contracts of employment so that the employer has expressly set out the obligations it is willing to accept. A badly drafted contract can harm both the employer and the employee, if the Courts are adopting "a more hands off" approach.

3. Does the employer have a right to inspect emails/ask that employees delete work emails from personal devices on termination?

Advances in technology have resulted in employees frequently working outside the office environment, often using their personal computer equipment and mobile devices to do so. As the High Court case of *Fairstar Heavy Transport NV v Adkins and another* shows, this can cause employers difficulties should their staff send work-related emails from their personal devices. In this case, it was held that there is no right of ownership to an email itself. The employer was therefore not able to recover emails which had been sent on the company's behalf by the individual but from his personal computer equipment. The outcome may have been different if the contents of the email itself contained copyright material or confidential information. However, the duty of confidentiality is quite narrow and only likely to apply to true trade secrets, rather than sensitive business data, and is therefore best not relied on.

This case highlights an area of exposure for employers. Employers should include a clause in their contracts of employment which sets out an employee's obligations in relation to such material acquired in the course of employment. This can be done by an express term requiring an employee to make emails available to the employer on request and to delete work related emails on personal devices at the end of employment, irrespective of whether the emails or other stored information is confidential or non-confidential.

4. Have the restrictive covenants been properly tailored to the employee?

It is always important to ensure contracts are updated following a promotion to reflect the new role and duties, but particular care should be taken in relation to restrictive covenants.

In *Patsystems Holding Limited v Neilly*, the employee was subject to a 12 month non-compete covenant from the first day of employment in a relatively junior role. On a later promotion, it was confirmed to him that his salary and notice period would increase but all other contractual terms would remain unchanged. On termination, a dispute arose as to the enforceability of the covenant. The Court held that at the time the covenant was entered into (when he started as a junior employee) the covenant was not valid for someone of his level. The subsequent promotion could not change that. Importantly, the Court did not consider the letter to be sufficient to re-introduce the covenant for the promoted role. Covenants should therefore be effectively restated on promotion or, indeed, a new contract should be tailored to the new role.

5. Is the contract intended to be the entire agreement?

The impact of an 'entire agreement clause' was another point highlighted by the *Lloyd* case. The Court took the clause stating that the contract was the entire agreement between the parties literally. The contract did not refer to an employee's entitlement to PHI cover and the contract was stated to be the entire agreement. The Court therefore held that the employee had no contractual right to the benefit and there was no scope for implying such a term.

It is possible for employers to behave in such a way that a contractual entitlement is implied. However, the *Lloyd* case serves as a reminder that should the parties intend other arrangements, regarding benefits or bonus payments for example, to be contractual, reference should be made to this in the contract, as an entire agreement clause could operate to frustrate that. Conversely, an employer can limit its obligations by including this clause.

6. Has the contract been signed and returned by the employee?

This step is often overlooked by employers, particularly when a revised contract is issued during employment. As the case of *FW Farnsworth Ltd v Lacy* showed, the Courts will not automatically treat an employee as bound by a contract sent for signature to the employee but which has not been signed by the employee but merely put in a bottom drawer and forgotten about. In that case, the employee was only bound by a new contract provided to him after he was promoted (but which he had not signed) because the Court found, on

the facts, that the employee had acted in reliance on that new contract. He had applied for a medical insurance benefit which was only available to him under that new contract.

There will be instances where acceptance of a new contract can be implied. However, this case shows that merely because an individual continues to work after a new contract is issued to them for signature, this will not be sufficient to amount to acceptance of that contract. To ensure employers are receiving the protection they intend under a new contract, every effort should be made to ensure that the contract is actually signed and returned by the individual. It is amazing how often we have seen this simple step ignored.

Conclusion

Taking these recent decisions together, there is certainly an emphasis on the fundamental importance of the contract of employment. The responsibility is on the employer to ensure that they are getting the deal right before they ask the employee to sign up to it. As these cases show, employers cannot rely on the Courts to help them untangle a badly drafted contract, but the Courts are now also less keen on finding ways to imply contractual protection for employees working under a clear and well drafted contract.

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