

An employer can enforce the employment contract against a departing employee without paying salary

What did the case decide?

In this very recent case, the High Court has decided that the employer was entitled to enforce the contract against a departing employee, even though the employer had deliberately stopped paying salary to the individual. This case offers a boost to employers who, until now, have had to choose between allowing an employee to walk out in breach and threatening a damages claim, or paying the individual salary and holding them to the contract. This decision offers a route which allows an employer, in some circumstances, to enforce the contract but withhold salary payments (*Sunrise Brokers LLP v Michael William Rodgers [2014]*).

Case facts

Mr Rodgers joined Sunrise as a derivatives broker in May 2009 but in October 2011 changed role to work on the launch of a precious metals desk. Under his new contract of employment, Mr Rodgers was only permitted to terminate his contract once an initial period of three years had expired, and thereafter only by giving 12 months' notice. However, before the initial period of three years had expired, Mr Rodgers tried to resign without giving any notice at all. Sunrise made it clear that they did not accept his resignation, that they wanted him to return to work, and that they considered that he remained employed and bound by the terms of his employment contract. However Sunrise ceased to pay Mr Rodgers his salary, given that he was not turning up for work.

After lengthy correspondence between their respective solicitors, Sunrise agreed to waive its full contractual rights and to accept a notice period from Mr Rodgers of six months from the date of his written resignation. However this did not resolve matters and litigation ensued. Mr Rodgers' primary position was that he was

entitled to resign with immediate effect, but as a fall back he claimed that if his contract had not ended at that point, it ended when Sunrise failed to pay his salary. According to Mr Rodgers, Sunrise could not have it both ways; if they held him to the contract they had to pay him under that contract. Sunrise sought a declaration from the Court that Mr Rodgers remained in their employment, and also sought an Order restraining Mr Rodgers from working elsewhere, both during his notice period and during the subsequent period covered by the post-termination restrictive covenants in his contract of employment.

To get to that point, the Court had to agree both points in Sunrise's favour. In particular, the Court had to decide whether an employer can refuse to pay wages when an employee is no longer ready and willing to work for them, yet, at the same time, keep the contract of employment alive so as to be able to enforce the employee's obligations under the contract.

High Court decision

The High Court agreed with Sunrise on both points. First they decided that the original resignation by Mr Rodgers had been a breach of contract by him. Sunrise were entitled to decide whether or not to accept that. They had made it clear that they did not accept it. The contract of employment, like any other contract, does not terminate automatically upon renunciation, but only on acceptance by the innocent party of the defaulting party's breach. This followed the Supreme Court's decision in *Société Générale, London Branch v Geys*.

Sunrise had chosen not to accept Mr Rodgers' breach, and the Court felt that they had sufficiently good reasons for not accepting the repudiation. Initially they believed that Mr Rodgers was a good worker and then they required his assistance in handing over

work. Ultimately, however, it was a sufficient reason to hold him to the contract that they did not want him to work for a competitor.

On the second point they agreed with Sunrise that there was no automatic obligation to make a payment to Mr Rodgers if he chose not to come to work. He could not claim a payment without delivering on his side of the agreement, namely working for Sunrise.

The Court felt that it was not a prerequisite of an injunction that the employee be paid for the period of the injunction. Mr Rodgers was not facing a choice between working for Sunrise or starving, and he had it in his power to elect to go back to work for the balance of his notice. Accordingly the Court decided that Mr Rodgers was still an employee, and would continue to be so until the expiry of the six months' notice that Sunrise had agreed to. Therefore the Court granted an injunction requiring him to observe the terms of his contract, other than to perform work. This meant that Mr Rodgers could not work for a competitor or contact any of Sunrise's clients. Following the notice period, the restrictive covenants in the employment contract would apply (albeit for a lesser period than provided for in the contract).

Impact

This is obviously a good decision for employers, illustrating that an employer is within its rights to cease paying salary where any employee is not willing to work, and by doing so will not bring the contract to an end. Working and paying wages are usually mutual obligations and, where one obligation is not performed, although this excuses the performance of a mutual obligation, this does not have to mean that the contract of employment as a whole automatically ceases to exist.

It is useful for employers to remember that they have the option to accept renunciation by an employee or, provided they have good reason for doing so, they can affirm the contract and keep it alive. But employers must take care when dealing with repudiatory breaches and decide promptly what approach they are going to take with an employee walking out in breach. In its initial response, Sunrise could easily have said something to Mr Rodgers which appeared to accept his resignation, or their HR department could have sent out his P45, which would have precluded them from holding Mr Rodgers to the terms of the contract.

The ambit of this case is important too. It was key that the employee was trying to get out of his contract and was refusing to come to work. This is a relatively common situation to arise, which is why the case is an important one.

It should be noted, however, that this case does not alter the position if it is the employer who chooses to suspend the employee, since in that case it is the employer who is preventing the employee from working, when the employee is willing to do so.

If you have any questions or require specific advice on the matter covered in this Update, please contact your usual Mayer Brown contact, or:

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