Employment Round-Up

September 2014

Our monthly review of key cases and new law affecting employers

Prior repudiatory breach does not prevent employee's constructive dismissal claim

Decision: The EAT has held that an employee's previous repudiatory breach of contract did not bar him from later claiming constructive dismissal. There were two main considerations in the EAT's decision: firstly, whether or not the employer in question could rely on the employee's prior breach to defend a claim that would have otherwise been a constructive dismissal claim and secondly, whether accessing the employee's private emails and then relying on these emails was in breach of the employee's right to a private life (Article 8 of the European Convention on Human Rights).

In relation to the first element, the EAT held that where a repudiatory breach of contract occurs and the party with the right to terminate did not do so and that party subsequently commits a breach of contract, the party originally at fault (in this case, the employee) may accept the breach and terminate the contract. Whilst the employee was therefore permitted to bring his constructive dismissal claim, the EAT endorsed previous case law in respect of compensation awarded to him. That previous case law made clear that if the party who was originally at fault was an employee who then brought a successful constructive dismissal claim, the compensation awarded could be reduced by up to 100% if it can be established that the employee would have been fairly dismissed had the employer known about the employee's original breach. As for the second element, the EAT went on to find that the use of personal emails sent by the employee that was in breach of the employer's email policy (a policy that had in fact been written by the employee himself) did not amount to a breach of the employee's Article 8 rights. It was only through a legitimate investigation into the employee's conduct that these emails were discovered. As the emails were sent from a work email address and were not marked as private, the EAT concluded that the Employment Tribunal had not made an error when it found that the employee did not have a reasonable expectation of privacy and that there had not been an unjustified interference with the employee's personal life.

Impact: This case highlights that although employees are able to bring a claim for constructive dismissal despite their earlier repudiatory breach and before an employer can terminate their employment, they are likely to receive reduced compensation for any successful claim as a consequence. Additionally, this case is a clear reminder of the requirement for clear policies and procedures in relation to use of email and internet and the need to ensure an employee understands these and how their use of the work email system will be monitored. Provided an employer sets these principles out clearly, this case demonstrates that employers who discover relevant material on their systems will be able to rely on such material either in disciplinary hearings or ensuing court proceedings.

Case: *Atkinson v Community Gateway Association UKEAT/0457/12*

HR letter advising the outcome of a grievance creates a contractual right to higher pay for employees

Decision: In this case, an HR consultant issued a letter to a group of employees following a grievance raised by the employees in respect of their grading and pay review. The HR consultant carried out the grievance investigations and subsequently wrote to the employees setting out the employer's decision to re-grade the employees and increase their pay. The Employment Tribunal originally concluded that the HR consultant did not have the authority to bind the employer to a variation of contract and rejected the employees' claim that the HR consultant's letter setting out their right to a higher pay grade had contractual status. However, the EAT overruled this decision concluding that although a grievance letter is not the usual manner in which contractual offers are made, regard had to be given to the intention and to the context. As, in this instance, the grievance was centrally about pay and the letter was drafted as a final decision, the EAT considered the HR letter to be a contractual document. The EAT also considered the issues of the HR consultant's authority to bind the employer, as well as assessing whether or not there had been a valid process of offer and acceptance in relation to the higher pay promised in the letter. In relation to the authority point, as the grievance was made to the employer and not the HR consultant in her personal capacity, added to the fact that the HR consultant was authorised by the employer to communicate on behalf of the employer the outcome of the grievance to the employees, the EAT concluded that the HR consultant was capable of binding the employer to a variation of contract. The EAT also had to consider the effect of the employees not actively responding to the letter from the HR consultant. It decided that where the change to an employee's terms is beneficial to the employee, the employee is considered to have accepted the change by continuing to work. The employer also argued that a mistake had been made in the HR consultant's letter as to the grade of pay offered in the letter; a mistake that the employer argued would have been picked up on by the employees. As the EAT upheld the appeal concluding that the letter was capable of creating a contractual right to higher pay, the question of whether the contract was void for mistake was remitted to be heard by a different Employment Tribunal.

Impact: This case is a cautionary tale for employers and careful consideration should be given as to how communications to employees are made in order to prevent giving rise to an unintended contractual promise. This case places an emphasis on the need for clear drafting of any letters detailing the outcome of a grievance, promotion or any other potential change to an employment contract. In this case, the change was an additional benefit of increased pay; the idea that this change was accepted simply by the employees continuing to work may have been different if a corresponding burden – such as a change in the employees' role and responsibilities – had been placed on them. However, the outcome of this case stresses the need for employers to be clear about what they are intending to offer when communicating with employees and if they propose to be contractually bound by such an offer. If there is no such intention, or if the employer intends there to be further stages to the process before a final decision is reached, this should be clearly conveyed to the employee in any communications issued.

Hershaw and others v Sheffield City Council UKEAT/0033/14

UK Employment Tribunal's territorial jurisdiction does not extend to a claim made by an employee who worked 49% of his time in the UK

Discussion: The EAT has upheld an Employment Tribunal's decision that a US citizen working 49% of his time in the UK but who was employed by a US company and paid in US dollars did not have UK statutory rights and could therefore not bring a claim for unlawful discrimination, a claim for ordinary unfair dismissal or a claim for unfair dismissal on the grounds of whistleblowing as his employment did not have sufficient connection to the UK. The key considerations for the EAT were that the employee had not given up his base in the US and moved his home and partner to the UK; the employee's dismissal had been conducted in the US; and the employee's international assignment to the UK and elsewhere had ended before his employment was terminated. The EAT concluded that the employee's employment did not have sufficient connection to Great Britain or British employment law and his contract of employment was considered to be overwhelmingly American in nature, expressly stating that the employee remained based in the US.

Impact: This case highlights the importance for an employer of clarifying within a contract of employment whether an individual who is sent to work in the UK is also intended to be based out of the UK. This express clarification could define the circumstances in which an employee is entitled to be have the protection of UK discrimination laws and when they are not, thus providing a degree of certainty for an employer.

Additionally, an important point in this case appeared to be that the employee was not in the UK when he was dismissed. Consequently, this case demonstrates that employers have a degree of control as to whether British employment law bites by structuring the working relationship accordingly: in this case, the employer ensured that the employee's base remained in his home country and that he was brought back to his home country to be dismissed. However, it is worth noting that had the facts of this case been different and the employee had been working closer to 100% of his time in the UK or had been an EU national, the balance might have tipped in his favour and the EAT may have come to a different conclusion.

Fuller v United Healthcare Services UKEAT/0464/13/BA

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