UK Employment Round-Up

February 2015

Our monthly review of key cases and new law affecting employers

Contract changes: Redundancy or SOSR

The case: Two HGV delivery drivers for EXOL Lubricants Ltd were unfairly dismissed when their employment was terminated, purportedly by reason of redundancy, following a change to their overnight parking arrangements. The drivers had been allowed to park at a location close to their homes to save on travel time, and when EXOL withdrew this arrangement to save costs, it claimed a redundancy situation had arisen on the basis that it had ceased carrying on business at that location.

The impact: Although the contracts of the drivers in this case clearly stated that their place of work was the delivery depot (and not the overnight parking location), this case serves as a useful warning for employers who employ individuals with no fixed place of work, or those with "informal arrangements" for their location. Informal arrangements may still be deemed to be a term of the contract, which will not be capable of change or withdrawal by the employer unilaterally, but will require an employee's consent.

In this case, it was clear on the facts that there was no redundancy situation, since there was no workplace closure (the delivery depot and not the employees' overnight parking location was their place of work, both contractually and in fact) or diminution in the employer's requirements for employees to carry out the work done by the dismissed individuals. However, the employer lost the case because it had contended that the individuals were redundant and that the dismissal was by reason of redundancy. Instead, the EAT commented that if the employer had relied on "some other substantial reason" for the dismissal, the result of the case may have been different, since it may have been able to make this out as a fair reason.

A prudent employer who is proposing contractual changes or a reorganisation should give the reason for dismissal in the alternative, whether it is primarily redundancy but in the alternative some other substantial reason, or vice versa. Where we have handled contractual changes or reorganisations of this nature, the approach adopted by the employer has been the same, irrespective of whether the dismissals are for a true redundancy or a reorganisation which qualifies as "some other substantial reason" (i.e. consulting over the proposed changes before any decisions are taken, and considering alternative ways of getting to the same outcome). The key distinction comes when a formal label has to be given to the reason, for example, in connection with the defence to an unfair dismissal claim.

EXOL Lubricants Ltd v Birch and another [2014] UKEAT 0219

Can an employee affirm their contract by claiming sick pay whilst on sick leave?

The case: The EAT has held that an employee's conduct in accepting 39 weeks' sick pay and waiting for 18 months to resign after an alleged breach of contract by the employer, affirmed her contract, thereby defeating her claim for constructive dismissal. Based on the facts of the case, the EAT held that the Tribunal had been entitled to reject the employee's claim that she had been too ill to resign any sooner.

The impact: Affirmation cases are very fact specific, and a degree of commonsense should always be applied to the question of whether or not an employee's acceptance of sick pay will amount to an affirmation of the contract. At one end of the spectrum, there are employees who may be so incapacitated that it would be unjust to hold their acceptance of sick pay as an affirmation of their contract, and at the other end of the spectrum there are employees who may be continuing to accept sick pay once they are better and are seeking to exercise other contractual rights.

This case is an important one. Employers should be alert to evidence that an employee who is off sick is affirming their contract, thereby prejudicing any claim for constructive dismissal. After all, it is relatively common place for individuals to be signed off sick, for example, after they face disciplinary charges for underperformance or misconduct. The employer should be looking to record the evidence of affirmation, since it may well be crucial in defeating the employee's subsequent claim.

Colomar Mari v Reuters Ltd [2013] UKEAT 0539

The jurisdictional scope for off-shore whistleblowing claims.

The case: An Italian banker living and working for Standard Chartered Bank in Singapore did not have a sufficient connection to the UK to bring a whistleblowing claim in the Employment Tribunal. The only connections that the employee had to the UK was that he had worked in the UK for a period of time before being recruited to work in Singapore, and his employer is headquartered in the UK. The EAT held that there was no basis to apply a looser test to whistleblowing claims than the well established one in *Ravat v Halliburton* for ordinary unfair dismissal claims. Applying this test, there was not a close enough connection for the Claimant to bring a claim in the UK.

The impact: This is a welcome decision for employers, since, if Mr Smania had been successful there would have been no clear limits to the provisions of the Employment Rights Act 1996 (ERA) in cases where there was a public interest disclosure. An employee of any origin, based in any country, would be able to rely on the rights of the Act if they were dismissed for blowing the whistle, so long as their employer was based in the UK. Often the jurisdictional battle is the key element in the claim. If the employer concerned does not realise that the individual has UK statutory employment rights, often these will not be taken into account by the employer in its decision-making process. As such, if an employee can convince an English Tribunal that the claim can be brought in that Tribunal, this is often enough to dispose of the employer's defences.

This case has made it clear that there is just one test for jurisdictional scope under the ERA, so whatever the reason for the unfair dismissal, the test will be the same. The questions the Tribunal should ask to determine jurisdiction are: (i) can Parliament reasonably be taken to have intended that the Claimant has the right to bring his/her claim before the Employment Tribunal; and (ii) in the case of expatriate employees who live and work abroad, is there a sufficiently strong connection with the UK and British employment law?

Smania v Standard Chartered Bank [2014] UKEAT 0181

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update.

Nicholas Robertson
Partner, London
nrobertson@mayerbrown.com
Tel: +44 20 3130 3919

Imogen Finnegan
Associate, London
ifinnegan@mayerbrown.com
Tel: +44 20 3130 3441

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