Employment Legal Update

Contents

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WELCOME

Welcome to our Autumn edition of the Update.

The headlines continue to be dominated by news about the recession, with employers looking at ways to cut costs associated with personnel. We have focussed on looking towards the future in our feature article. The recession has been and continues to be testing, but there are steps businesses can take now that will benefit longer-term stability and profitability. Examples of innovative initiatives that have been adopted by UK employers are considered in our news section.

Also in our news section, we have reported on the recently published FSA revised Code of Practice. This intends to bring about a culture change in the banking sector by linking pay to effective risk management. Only time will tell what impact this will have in practice.

Fortunately for employment lawyers at least, there has been the new draft Equality Bill to distract us from all the doom and gloom. The Bill contains a number of proposals that will constitute a significant change, as well as a large number of changes aimed at harmonising existing law. We have considered some of the main changes that will be of interest to employers in our news section.

We reported in our last edition of the Update on the European Court of Justice's decision in *Stringer* relating to paid holiday entitlement during periods of sickness absence. The case has now been considered by the House of Lords but unfortunately this has not added much to aid employers in understanding their legal obligations. We have reported on the House of Lords decision in our news section. We have also reported on another important European Court of Justice decision, *Pereda*, which takes us one step beyond *Stringer* in deciding that workers who fall ill during a period of pre-arranged sick leave are entitled to request to take their annual leave at a later date, even if this means allowing carry-over to the next holiday year. We have considered some practical issues that may arise in the context of these cases in our dilemmas section. These cases will undoubtedly lead to amendment of the Working Time Regulations, or further case law in an attempt to construe UK law so that it is compatible with EU law (as it is currently not in line with it).

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NEWS

Swine flu

The latest news on swine flu is that the number of new cases each week is increasing dramatically, suggesting that the second surge of the virus is underway. In October, new cases of swine flu doubled, with an estimated 53,000 new infections compared to 27,000 the previous week. At the time of writing 122 people have died and 506 people have been hospitalised in the UK as a result of having contracted the virus. A swine flu vaccination programme began on 21 October 2009 and it is expected that 12 million high-risk patients will receive the vaccine by the end of November. There is currently no sign that the virus is becoming more severe or developing resistance to antiviral medication.

The Government is estimating that in the coming months up to 12% of the workforce could be absent from work for reasons relating to swine flu. It is therefore vital for employers to ensure measures are in place to keep their businesses running, while complying with their legal obligations and without compromising employees' health and safety. In England, the current advice for employees if they have flu-like symptoms, is to stay at home and check their symptoms with the National Pandemic Flu Service.

Employers need to ensure that they have contingency plans in place, should there be high levels of staff absence. This could include considering options for other methods of communication rather than face-to-face meetings, ensuring IT systems can handle large numbers of employees working remotely, identifying staff who have interchangeable and key skills, considering flexible working patterns and ensuring that contact details for staff are up to date and circulated.

It is also important for employers to put in place measures to protect the health and safety of their employees. Employers have a duty to take steps which are reasonably necessary to ensure the safety of their employees and not subject them to unnecessary risks of injury. Employers are advised to carry out a swine flu risk assessment and identify the key issues that may arise, should large numbers of employees be absent. It is also necessary to ensure that employees are updated and informed of the latest position, and that training is given on hygiene issues to minimise the risk of the virus spreading. Employers need to consider how swine flu impacts on staff with dependants, as employees have a statutory right to take time off work in an emergency to care or make arrangements for dependants.

Employers are also advised to monitor any changes to official advice.

Cost cutting initiatives

Although businesses often see redundancies as a way out of the economic difficulties they face, many companies have been working hard to avoid job losses and to maintain the skilled and experienced workforce they will need to see out the economic downturn. Making someone redundant can often cost the same as six to nine months' salary when you factor in costs such as redundancy pay and management time, and so many businesses are seeking to reduce overheads by other means. In recent months a number of employers have conducted a radical review of their employment.

One such example in the news is BT, which has apparently been trying to transfer some of its workers to rivals to trade through the recession with as few compulsory redundancies as possible. BT workers would retain their membership of the BT pension scheme and continue to accrue service during placements with competitors, which would be for a minimum of one month. However, they would be paid by the new company, thus helping BT to cut its payroll costs. Whilst this radical scheme does appear innovative and cost effective, it may not be an appropriate solution for all employees or certain grades of staff. A potential problem with this approach is the prospect of corporate secrets being passed between companies; a confidentiality agreement would be practically impossible to police. This approach would therefore only be appropriate where there is no risk of a breach of confidential information. In addition, there would need to be some form of agreement between the parties to determine who should be liable in the event of a health and safety breach or possible Employment Tribunal claims arising from the relevant period.

Another interesting initiative has been adopted by British Airways, where almost 7,000 staff agreed to take part in cost-saving measures, including 800 who agreed to work without pay for up to a month. Staff who offered to work without pay still received shift allowances and other payments, although they sacrificed their basic pay, with the pay deduction spread over three to six months. Around 4,000 staff agreed to unpaid leave, and 1,400 agreed to switch to part-time work. BA have said that this will save them approximately £10 million. However the recent news that the unions are taking BA to court, seeking an injunction to prohibit some proposed changes indicates that there is plenty of scope for disagreement.

Other examples of cost cutting initiatives to avoid redundancies include KPMG, where 750 employees took up offers of sabbaticals of between four and 12 weeks on 30 percent pay, or reduced their working week to four days, with a subsequent 20 percent pay cut. In the car manufacturing industry, Honda closed their Swindon factory for four months and reduced wages by three percent on workers' return. Many other companies have implemented pay freezes.

Our article in this edition further considers issues such as encouraging flexible working, cutting pay and introducing sabbaticals.

Review of default retirement age

The Government has launched a strategy document "Building a society for all ages" in which it has announced that its review of the default retirement age of 65 will be brought forward to 2010. At present, an employer may fairly dismiss employees who are over the age of 65 by reason of retirement. The Government had pledged to review the default retirement age in 2011, but the review will now be brought forward in response to the "change in economic circumstances".

The Government has begun engaging with stakeholders and gathering evidence to conduct the review. If, following that review, the default retirement age is increased or abolished altogether, any changes would be implemented from 2011 onwards to allow employers to prepare and employees to consider their retirement plans.

Taking a break from being ill – Employees accrue holiday whilst on sick leave

Regular readers of our Employment Legal Update may recall the case of *Stringer v HMRC*. This long running saga concerned the difficult issue of a worker's right to accrue and take statutory holiday during sick leave. The case went to the ECJ (as we reported in our last Update) where it was decided that workers are entitled to accrue statutory holiday during sick leave. The case returned to the House of Lords this Summer where employment lawyers anticipated being enlightened on how the new approach would work in practice. Unfortunately, after the ECJ decision the issues left to be decided by the House of Lords were limited. This was mainly because HMRC is a public body and so bound directly by the Directive, from which UK holiday rights are derived. As a consequence, the House of Lords decision has not taken us any further in terms of clarifying how this should all work in practice for private sector employers.

The Lords did confirm that unpaid holiday claims can be brought under the Employment Rights Act 1996 ("ERA") as unlawful deductions from wages. This is bad news for all employers as it means the time limit within which workers can bring such a claim has been greatly extended. Under the Working Time Regulations a worker has three months from the date payment should have been made to bring a claim. Under the ERA a worker has three months from the last failure to pay, in a series of such failures. Future cases will also now be required to determine issues such as in what circumstances a worker can carry over accrued but untaken holiday to the next holiday year.

An unfortunate repercussion of this case is that employers who operate a PHI scheme may now be faced with an additional expense. Claims from these employees for backdated holiday may be significant, going back a number of years. This is unlikely to be covered by the PHI scheme itself. Employers may therefore wish to think twice before providing PHI cover to employees in the future, or at least review their terms of cover, to reduce the coverage so that the holiday cost is neutral.

Despite the uncertainty caused by this case, it has highlighted the need for employers to be extra vigilant when managing long-term sickness absence. We have considered some practical situations that may arise in our dilemmas section of this Update.

The Equality Bill – A fairer future for all?

Spring saw the publication of the proposed Equality Bill, which is designed to harmonise and strengthen the law by creating one single Act covering all forms of discrimination, as well as introducing some new measures. Some of the key changes proposed of interest to employers are as follows:

- The introduction of a new clause dealing with multiple or "combined" discrimination claims. This would enable employees to make a direct discrimination claim based on a combination of two or more protected characteristics. This is likely to lead to more complex claims, and greater challenges for employers in defending such claims.
- Secrecy pay clauses, which prohibit employees from discussing their pay with other employees, would be unenforceable. It is anticipated this will help narrow the present gap between pay for men and women.
- The power to require businesses with more than 250 employees to publish information about the difference in pay between their male and female employees. The power would not be used before 2013 based on current proposals, although there is clear pressure for businesses to move to this sooner on a voluntary basis.
- Employment tribunals would be able to make recommendations impacting on the wider workforce, not just the individual claimant. So for instance, if an employee successfully brings an equal pay claim, an Employment Tribunal could recommend a pay review, or training for management generally. Failure to comply with such a recommendation would lead to adverse inferences being drawn against the employer in future cases.
- The Bill would significantly extend an employer's ability to take "positive action". An employer would be able to recruit or promote an individual with a protected characteristic, where they are equally qualified with other job or promotion applicants and the employer reasonably thinks the person with the protected characteristic suffers a disadvantage or is under-represented in that field of employment. For instance, an employer could promote a female above her male peers if there are disproportionately fewer women at management level. There is no obligation to take positive action, and we anticipate that it will be used very rarely by private sector employers.

The Bill is due to go before the House of Lords in the Autumn with a view to an October 2010 implementation date. Given some of the contentious new provisions in the Bill, we suspect it will be implemented later than that. If the Conservatives are voted in at the next general election, the indication is that they will significantly amend the Bill or even scrap it altogether.

FSA Code of Practice on Remuneration Policies

The long awaited FSA Code of Practice on remuneration policies has been published and sets out the FSA's position on financial services pay practices. The Code will give firms greater leeway to devise remuneration packages than originally anticipated, in comparison with the previous draft published in March 2009. In addition three of the Code's proposed "rules" have been amalgamated and their status reduced to "guidance". Whilst there may now be scope for firms to interpret this guidance more widely, it must still be taken into account when deciding how to meet the rule.

The key aim will be for firms to establish remuneration policies that are consistent with and promote effective risk management. The Code will apply to employees who are in a "senior influence function" or employees whose activities will have a material impact on the firm's risk profile. Some of the key points arising from the Code are as follows:

- firms must not offer guaranteed bonuses for more than one year;
- at least two thirds of any bonus payment should be deferred and spread over at least a three year period for senior employees in circumstances where such bonus is significant when compared with the fixed part of such employee's remuneration; and
- remuneration awards should be based on an appropriate combination of factors including the future performance of the firm and a division or business unit.

The FSA believes the Code will apply directly to around 26 banks, building societies and broker dealers operating in London and also overseas branches of UK firms (inside and outside Europe). It will not directly apply to UK branches of firms headquartered in other parts of Europe, though it will apply directly to overseas branches of UK firms. It is also anticipated that it will influence other regulated entities, and their remuneration structures. HM Treasury announced in October this year that the UK subsidiaries and branches of certain leading non-UK banks have now voluntarily agreed to comply with the FSA Rule and Code.

The FSA expects the Code to be in place by 1 January 2010 although there is some leeway with contracts entered into before 18 March 2009 which are not compliant with the Code. These contracts will need to be amended before 31 March 2010 with all non-compliant practices ceasing by 31 December 2010.

The FSA states that the Code may not change "bonus culture" overnight and commentators have questioned whether it will have any significant impact at all given the concern about damaging Britain's competitiveness internationally in the finance sector.

France

A recent decision of the French Supreme Court on difference in treatment is expected to have a significant impact on businesses in France. The case concerned a company which had implemented a collective agreement which provided that managers enjoyed certain advantages (30 days' paid leave per annum) over non-managerial staff (25 days' paid leave per annum). The Court found that a difference in seniority cannot of itself justify such a difference in treatment where employees are effectively in a similar position as regards what they do. Whether a difference is objectively justified will be a question of fact. As a result of this case French employers are advised to review any terms which purport to provide enhanced terms based on grade and to determine whether there is an objective reason capable of justifying that difference in treatment.

Italy

In the wake of a number of high profile accidents at work, particularly in the construction industry, the Italian Government has introduced a series of new laws in an attempt to deal with this problem. The most recent law was the Law Decree n. 106/2009 introduced on 3 August 2009, as an amendment to the Law 8/2008 (the last Safety at Work law). The new legal decree introduces greater controls and new sanctions on employers. In particular, it provides for the possible suspension of a business if more than 20% of the company's workers are found to be illegal workers. Illegal workers have been singled out for these purposes as, according to the Italian government, companies are less likely to insure them for accidents at work.

ARTICLE

Making the most of a difficult situation

The words "current economic downturn" have become de rigueur in the news and in taxi-cab conversations. For most of us, the words have a negative connotation. But not for everyone. For some it represents an opportunity. Indeed, many entrepreneurs and businesses claim to have risen from previous recessions like a phoenix from the ashes.

As we have reported in our news section of this edition of the Update, there are employers who are taking initiatives to cut costs with a view to avoiding redundancies. A number of employers are also taking the opportunity to terminate defined benefit pension schemes which have been a heavy financial burden for some time. But the focus need not only be on reducing headcount. There are many measures that employers could be taking now not simply to avoid redundancies, but to make the business more efficient and effective generally, with a view to long-term stability and profitability. Rarely are employers afforded such a good excuse to make changes that are long overdue, than the "current economic downturn". Some of the options employers could consider are set out below. These include helping with the direct costs associated with employing staff, in addition to ways to avoid recruitment and re-training costs associated with employee attrition.

Reviewing terms and conditions of employment

Employers may wish to conduct a review of their existing terms and conditions to determine whether now would be an opportune time to make changes required. This does not all have to be about cutting pay, closing defined benefit pension schemes or unpaid work. Examples of less controversial changes that might be made include:

- Changing shift patterns: Some employers have found changing shift patterns significantly more cost effective for various reasons without the disruption or upfront costs associated with redundancies;
- Changing the terms of bonus or other compensation schemes: Taking a leaf out of the FSA's book, for example, spreading bonus payments over more than one year may help to encourage loyalty. Likewise, providing that a bonus is repayable if the employee leaves within, say, six months (we have seen bonuses repayable if the employee leaves within a three year period) may encourage them to stay, particularly as this means they will then have worked for part of the next bonus year;
- Allowing employees the option to take up to a week's unpaid leave each year, to be taken during periods when the business is most quiet. The feedback we have had from clients is that many employees were sceptical about taking a longer sabbatical of a month or more. They were often too scared about their job security and their employer's perceptions of them to take up the offer. Employers such as British Airways who have offered one week breaks, seem to have had a more positive response;

- Reducing or varying the terms for sick pay (particularly in light of the *Stringer* and *Pereda* decisions);
- Re-negotiating benefit costs with suppliers (such as car fleets and private medical insurance);
- Moving towards more flexible benefits, which enable employees to select the benefits that are more appropriate for them; and
- Reducing the use of temporary workers by asking existing employees to support other parts of the business during quiet spells.

While a policy which is non-contractual can be amended, employers should be aware that even if a policy purports to be non-contractual, there is a risk that it could have become contractual. This can happen where the policy has been followed without exception for a substantial period.

If the benefits which an employer wants to amend or withdraw are contractual (whether express or implied), an employer will need to check whether the contract contains a clause permitting changes to be made. If there is such a clause, it should be used only to implement small changes, as significant changes could result in the risk of constructive dismissal claims.

If benefits are contractual and are unilaterally withdrawn, employees may sue for breach of contract, unlawful deductions or resign and claim constructive dismissal.

The simplest solution for the employer is to obtain employees' consent by consultation. The feedback we have received from a number of our clients is that employees may be more prepared to accept changes than they perhaps otherwise would be given the current state of the UK economy.

If employees refuse to agree to the changes, termination and re-engagement could be considered. However employers should be aware that such a process with 20 or more staff will technically amount to a redundancy exercise and will trigger collective consultation obligations.

Key retention tools

The first shoots of permanent economic recovery are likely to lead to greater numbers of employees looking for greener grass and better compensation elsewhere. It is estimated that the hidden cost of recruitment is more than £5,000 per employee, although for professional employees this figure is likely to be significantly more. Accordingly, employers could consider new ways to retain key and valued staff. Below are some examples employers might wish to consider to help them achieve this.

Flexible working

While many employers have implemented flexible working arrangements to cut costs, the availability of flexible working arrangements can also help in attracting and retaining a workforce. We believe that there has been a significant and surprising shift in attitude. Staff, having seen others put into such arrangements, or worked

reduced hours themselves to avoid redundancy, are now more comfortable about asking for such arrangements. Examples of the types of flexible working arrangements that may be offered include reduced hours, compressed hours, annualised hours, job-sharing, term-time working and working from home.

If flexible working arrangements are to be offered to employees, the terms of the arrangements should be clearly set out in a policy or a letter and include details of how the arrangements will affect the employees' pay and benefits and whether the arrangements will affect future job prospects.

Sabbaticals

While sabbaticals allow employers to reduce short-term costs, they can also have the effect of incentivising and retaining key talent and improving morale and employer/employee relations. Many employers will have encouraged sabbaticals for the first time as a result of the recession. However it may also make good business sense to allow and encourage sabbaticals during the business' traditional quiet spell each year. For many businesses this occurs around Christmas and during the Summer holidays, when employees with children are most likely to want to take time off.

In order for sabbaticals to work effectively, employers should clearly define the employee's entitlements during the sabbatical and on return. These can be set out in a policy or letter:

- Employers should ensure that eligibility criteria should be fair, non-discriminatory and objective;
- Set out in the letter or policy whether entitlement to contractual rights, such as pay, pensions and holiday, will continue to accrue during the sabbatical (statutory rights will continue to accrue as the individual remains an employee). The employee must consent to any variations to his or her contract; and
- Include details of whether the employee will be eligible for a bonus and if so, on what basis it will be determined.
- Employees should also be clear whether the purpose is to act as a benefit to employees (flexibility/work life balance) or a cost saving to the employer, since this may affect the arrangements offered.

Career development policies

The effect of redundancies and other cost cutting measures can have a negative impact on employees' motivation and morale. Employers can demonstrate their commitment to employees by implementing career development policies and appraisals, which set out clear objectives and targets and help guide the employee to the place they want to be. An employee who feels they have better prospects of a career with their current employer are less likely to be swayed by a competing employer's promises.

One of our clients with whom we have discussed this has been looking at ways to hold on to their strongest performers when the market improves. They found that career development could be just as important to employees as money. As a result they have started a succession planning programme in preparation for market improvements. This is intended to result in all strong performers having clear progression steps and development plans based on a realistic understanding of where they should channel their careers.

Charitable team-building

Charities are likely to have seen a drop in donations in terms of time and money. Likewise, many businesses will have slashed social and team-building budgets some time ago. A cost effective way to help team-building and improve morale generally would be to undertake a community project for say, a day.

These are just a flavour of the types of changes businesses could consider making with a view to cutting costs now and in the future, which can help to develop a more efficient, stronger business going forward.

EMPLOYMENT DILEMMAS

In this edition of the Update, we are focussing on the issues surrounding holiday accrual during sick leave in light of the recent cases of *Stringer v HMRC* and *Francisco Vicente Pereda v Madrid Movilidad SA*.

Just as the dust was beginning to settle following the *Stringer* decision along comes the case of *Pereda* to cause yet more confusion to employers. Both of these decisions do not sit easily with the UK's Working Time Regulations.

Whereas *Stringer* decided that a worker accrues annual leave whilst on sick leave, *Pereda* had to decide the question of what happens where a period of sick leave coincides with a period of pre-booked annual leave. The case had to decide whether the purpose of the leave (i.e. "to enable the worker to rest and to enjoy a period of relaxation and leisure") is defeated if the employee cannot switch to sick leave and carry the holiday over to another day.

The facts

Mr Pereda had the misfortune of suffering a workplace injury shortly before a pre-booked period of leave. By the time he had recovered, he had only two days of leave remaining. His employer had a collective agreement which provided that the works council would produce rotas for annual leave which were subject to the approval of the employer. Any changes to that rota had to be made on 45 days' notice. Mr Pereda asked his employer if he could rearrange his annual leave but his request was declined.

The decision

The ECJ, clearly influenced by the fact that the right to a minimum period of annual leave is seen as a fundamental Community right, ruled that an employee in Mr Pereda's position must be given the opportunity, at his request, to take his leave at a later date (which did not coincide with sick leave) even if that had the consequence of leave being carried over into another holiday year. Mr Pereda's illness started before his holiday. However the same principle would apply to an employee who falls ill whilst on annual leave. This decision conflicts with the UK Regulations which give the employer the right to give notice to an employee to take leave on particular dates or to cancel or re-arrange a period of leave requested by an employee. In addition, employees are not given a right to carry over holiday by the Regulations, and it was generally assumed that sickness occurring during holiday was just "bad luck". *Pereda* essentially gives an employee the right to elect not to take annual leave at a particular time, if it would coincide with a period of illness.

Impact

Prior to *Pereda*, if an employer was faced with an employee returning from two weeks' holiday, claiming to have been ill in bed for the entire duration of the holiday, the employer would have been well within its rights to advise the employee that he was not entitled to any further leave (although some may have adopted a less robust approach). Now, if the employee requests that the two week period be treated as sick leave rather than annual leave, the employer will have to consider that request. There has been concern following *Pereda* that this could be open to abuse by employees trying to extend their annual leave allowance. Employers may also feel aggrieved if holiday illness brought on by over indulgence for instance, is covered. However our view is that the Statutory Sick Pay scheme does not allow an employer to withhold SSP for self-inflicted illness and so there is little that can be done about that issue.

However, with the correct procedures in place, employers should be able to prevent fabricated claims.

The Regulations provide that at least four weeks' annual leave must be taken in the leave year in question (subject to any provision for carry over in a relevant agreement). For private sector employees this remains the law, despite what was said in *Pereda*. Therefore, if an employee elects to defer annual leave in the *Pereda* situation, the employer can require that leave to be taken in the relevant holiday year, subject to any carry over that is permitted by the employer. That will remain the case until such time as the Regulations are amended.

Next steps

Some employers may dig their heels in and continue to deal with annual leave requests in accordance with the Regulations. However, it is likely that most employees will become increasingly familiar with the *Pereda* decision and will push their employers to comply with it.

Given that an amendment to the Regulations is inevitable, we would advise employers to amend their sick leave procedures (whether set out in the contract of employment or a handbook) to provide as follows:

- If an employee is taken ill during a period of annual leave or a pre-booked period of leave coincides with a period of illness, and the employee wishes to treat the period of illness as sick leave rather than annual leave, s/he will be required to follow normal notification procedures on the first day of sickness (even if abroad). It will be insufficient to notify the employer of the illness on return from annual leave.
- The employee may also be required to produce a medical certificate to verify the illness, if s/he wishes to reclassify holiday as sick leave. Whilst it is not generally permitted to require employees to obtain a certificate to demonstrate entitlement to statutory sick pay in the first seven days of any absence, we do not see any reason why an employer could not require a doctor's note substantiating the illness in order to reclassify holiday as sick leave.
- An employee who elects to take sick leave in lieu of annual leave will be paid SSP only. This is the obvious route to take where company sick pay is discretionary. If company sick pay is contractual then it may be a case of renegotiating a change in the contract, and altering the standard terms for any new recruits.
- An employee is not obliged to treat a period of annual leave as sick leave in these circumstances and the employer can treat the period as annual leave unless the employee makes a request to the contrary.
- The relevant period of annual leave may be taken at a later date (in the same year) with the prior approval of the manager (subject to any carry-over provisions).
- An employee cannot be paid in lieu of annual leave other than on termination.

If employers take these simple steps, we believe that the ramifications of *Pereda* should be relatively minor.

This report originally featured as an email alert.

KEY CASES

Erosion of the without prejudice rule?

Oceanbulk Shipping & Trading SA v TMT Asia Limited and three others

The High Court considered in this case whether evidence of without prejudice exchanges between the parties before they concluded a settlement agreement could subsequently be relied on as evidence of the meaning of that agreement, where there was a dispute as to its terms. Ordinarily, the without prejudice rule will prevent statements made in a genuine attempt to settle an existing dispute from being admitted as evidence against the party that made them.

Facts

This case concerned a dispute about the meaning of the terms of a settlement agreement. Although the facts of this case are not employment-related, the case has implications for without prejudice discussions in the context of settlement agreements generally.

In this case the parties had held discussions about the payment of an outstanding invoice, which led to the conclusion of a written settlement agreement. A dispute arose between the parties as to the terms of the agreement. Oceanbulk claimed that because the pre-agreement discussions were without prejudice, they could not be admitted as evidence to the interpretation of its terms. TMT countered by saying that the exchanges were relevant to the proper interpretation of the settlement agreement.

Decision

The court decided that if evidence as to whether there is a binding settlement agreement at all can be allowed, so potentially can evidence as to what was actually agreed. If the evidence in question supports the allegations made by the party asking for it to be allowed as evidence, it can be relied on by that party.

Impact

This decision represents a further erosion of the well-established without prejudice rule. As a result, employers should be aware of the fact that when parties are in negotiations with the aim of reaching a settlement, it is important to be cautious about making admissions, and keep it in the back of their mind that any statements made during without prejudice discussions could be admissible to help interpret the subsequent agreement. Employers should be careful to ensure that their views are put across, particularly if the deal is of commercial value (costs more to fight than settle) and the employer denies any wrongdoing.

Responding to serious breaches by employees

Cook v MSHK Limited and Ministry of Sound Recordings Limited

A repudiatory breach by an employee entitles an employer to terminate their contract immediately and summarily dismiss the employee. This case illustrates that once an employer has knowledge of a breach, which may result in the employee's summary dismissal, it should act without delay or at least expressly reserve the right to take action. Otherwise, there is the risk that the employer may be deemed to have affirmed the contract and lost its opportunity to react.

Facts

Mr Cook's employment was subject to a six month notice period and a post-termination restriction preventing him from soliciting key artists, suppliers and customers. Mr Cook resigned on notice, on 18 May 2007, having accepted a job at one of MSHK's competitors. Mr Cook advised MSHK that he would not be undertaking any activities that competed with MSHK whilst working for his new employer. However, on 22 May MSHK became aware that Mr Cook would be competing against the company when he began working for his new employer. After a heated confrontation Mr Cook went off sick with stress on 23 May. MSHK wrote to Mr Cook on 24 May to explain its position that it had concerns about a possible breach of confidentiality with Mr Cook leaving to join a competitor. MSHK reminded Mr Cook of his contractual obligation, including of fidelity, and wished him a speedy return to work. Mr Cook was not warned about possible disciplinary action at all.

Upon his return to work on 4 July, disciplinary proceedings were commenced. Following a disciplinary hearing on 19 July Mr Cook was summarily dismissed on 3 August on grounds that his conduct had amounted to a breach of the duty of trust and confidence.

MSHK argued in the subsequent proceedings that it had not taken disciplinary action against Mr Cook as it had wanted to show him "sympathy and thoughtfulness", in an attempt to bring him back to work sooner. MSHK had claimed it was reluctant to deal with this issue whilst Mr Cook was off sick in case he might bring a successful claim for constructive dismissal and so obtain a release from the restrictive covenants in his employment contract.

Decision

The Court of Appeal decided that MSHK had not reserved its position in relation to the alleged dishonesty and had given no indication, for a significant period of time, that it was intending to bring disciplinary proceedings about Mr Cook's perceived dishonesty. The delay precluded MSHK from relying on this behaviour as a reason for justifying Mr Cook's dismissal.

Impact

This case illustrates that once an employer is aware of an employee breaching their contract of employment, if it is not going to act immediately it should expressly reserve its position in relation to the alleged breach. There is obviously a fine line for the employer to take in these situations. On the one hand it will not want to exacerbate the situation, especially when dealing with employees who are off sick, but on the other hand, it will not want to be deemed to have affirmed the contract. Unfortunately, the judgement did not provide an answer on how to reconcile the need to reserve the employer's position adequately against the desire to leave the employee be while off sick. One option would be to send a short letter to the employee advising them that the matter will be determined upon the employee's return to work, but emphasising the seriousness of the allegations if they are true.

Who is entitled to legal representation?

Kulkarni v Milton Keynes NHS Foundation Trust

The Court of Appeal has held that a doctor was contractually entitled to be legally represented at an internal disciplinary hearing. The case is important because the Court went on to consider whether there was a general legal right to legal representation at these hearings.

Facts

Dr Kulkarni faced charges of serious professional misconduct as a consequence of a patient making an allegation of an inappropriate examination. Dr Kulkarni was suspended and the Trust commenced disciplinary proceedings against him. Dr Kulkarni requested permission from the Trust to have a legal representative at the dismissal meeting. The Trust refused and Dr Kulkarni applied to the High Court for an injunction to compel the Trust to permit him legal representation.

Dr Kulkarni argued:

- that an implied term of trust and confidence required the Trust to exercise its discretion to permit him to have legal representation because (a) the allegations against him were very serious and which, if he was found to be guilty, would have a severe impact on his current and future employment in the medical profession, and (b) the defence was too complex for him to present; and
- Article 6 of the European Convention on Human Rights (the right to a fair trial) had been breached.

In response, the Trust relied on an express term in the NHS disciplinary procedure which excluded the right to legal representation. The express provision referred to stated a practitioner may be represented by such a representative who "may be legally qualified but they will not, however, be representing the practitioner formally in a legal capacity". The High Court rejected Dr Kulkarni's arguments. It held that there was an express clause in the contract prohibiting legal representation, therefore, this would override an implied term providing a discretionary right. Furthermore, the denial of legal representation in these circumstances did not breach Article 6 .
Dr Kulkarni appealed to the Court of Appeal.

Decision

The Court of Appeal examined the express wording in the NHS disciplinary procedure and decided that the term "not representing the practitioner formally in a legal capacity" was meaningless and should be ignored in determining his rights. Consequently, the Court of Appeal upheld Dr Kulkarni's appeal and decided, pursuant to Dr Kulkarni's contract of employment, that he was entitled to be represented by a lawyer instructed by his medical defence organisation, at his disciplinary hearing.

Having decided the appeal in Dr Kulkarni's favour, the Court of Appeal had no need to determine the Article 6 argument. Nonetheless the Court made a number of comments, which are not binding in future cases, but are a very clear steer:

- Article 6 does not apply merely because someone is at risk of losing their job. However beyond the narrow impact for those concerned by the NHS disciplinary policy, the case has a wider impact, even for private sector employees. A tribunal could now easily determine that a dismissal was unfair if the charges were sufficiently serious to equate to quasi criminal charges, as the consequence could end the individual's career. There has already been a second case, *R (on the application of G) v The Governors of X School and another [2009]* in which the High Court held that Article 6 entitled a teacher to legal representation in a disciplinary hearing, because of the seriousness of the allegations against him.
- Article 6 would be applicable where an NHS doctor faces charges of such gravity because, in the event they are proved, the doctor will be barred from employment in the NHS.
- In civil proceedings, Article 6 should imply a right to legal representation because a doctor is facing what is in effect a criminal charge despite being dealt with by way of disciplinary hearing.

Impact

There are obvious immediate effects for doctors and dentists employed by the NHS and those who have a contractual right to legal representation by someone instructed or retained by their medical defence union. However, there is a wider impact.

Whilst it could be said that Article 6 arguments were made only because the case involved a public authority, it is possible for employees to run the same argument against private employers. There are potential circumstances where a Tribunal may be persuaded that a dismissal which contravenes the European Convention on Human rights is unfair. Following the recent decision in *R v The Governors of X School and another* [2009], employers need to be alive to the fact that tribunals are moving towards introducing certain circumstances where employees are entitled to legal representation.

Having a lawyer at a disciplinary hearing would completely change the face of an internal hearing: it would lengthen the process, and increase stress and cost for both parties. Furthermore, if an employee is going to be represented, an employer is going to want to be on an even footing. This in turn increases the chances that the internal hearing will simply be the first stage in a trial.

We understand that this case is being appealed to the Supreme Court (formerly the House of Lords). In the meantime, we recommend taking legal advice is faced with a request for legal representation at an internal hearing.

This case commentary is taken from part of an article which has been published on PLC online.

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