Employment Law dispatches

Willans LLP I solicitors

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Welcome

We are delighted to introduce our new team member, Asim Khan, in this month's edition. In 'case law watch' he reports on legal decisions about non-compete restrictions, mistakes in communication and employee resignations.

We are planning next year's seminar programme and would appreciate suggestions of any topics you would like covered. Also, as usual, any feedback on this edition is gratefully received. Please email **matthew.clayton@willans.co.uk**

Matthew Clayton
Partner and head of employment – *Chambers UK* rated: *'a "very efficient and practical" lawyer'.*

Legislation review

With Matthew Clayton
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Reserve forces

The Strategic Defence and Security Review has brought radical cuts to our regular forces in recent years. At the same time, although the withdrawal from Afghanistan is well underway, there seems no let-up in the demand for Britain's military capabilities overseas. Reservists have been used at unprecedented levels in recent years: they made up 12 per cent of UK forces in the combat phases in Iraq. There are currently more than 22,000 serving reservists and, under current government plans, that number will increase to 35,000 by 2018.

To assist this process, from 1 October this year, small and medium-sized enterprises and equivalent-sized charities and partnerships will be paid up to £500 per month for any reservist employee who is mobilised. These payments are on top of the existing financial assistance that covers the cost of replacing reservists when they are mobilised and the retraining costs when they return to work. The payments assume that the reservist is on a full-time contract and works at least 35 hours a week. The amount is pro-rated for periods of less than a month and where the reservist is contracted to work less than 35 hours a week.

You are obliged by law to re-employ any reservist who was employed by you in the four-week period before mobilisation. The employee must be allowed to return to their job within six months after the end of their military service, on terms and conditions no less favourable than those which would have applied if there had been no call-up. If this is not reasonable and practicable, the employee must be offered the most favourable terms and conditions that are reasonably practicable in the circumstances.

It is actually a criminal offence to dismiss a reservist because they are called up or likely to be called up. However, reservists have been placed at a disadvantage when making claims for unfair dismissal, because periods of call-up are not usually counted for continuity of employment purposes. This means that it is more difficult for reservists to satisfy the requirement for two years' qualifying service. As a consequence, as from 1 October 2014, reservists will be exempt from the 2-year qualifying period in bringing unfair dismissal claims if the reason, or primary reason, for dismissal is because they are a reserve.

Most employers would recognise that no amount of financial assistance can make up for the disruption to business caused by a reservist being called up. However the fact that an employee is prepared to serve as a reservist shows a degree of commitment to their country, which is also likely to be reflected in their commitment to your organisation; employers would be well advised to recognise, respect and value this.

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It is unlikely that many unfair dismissal claims will be brought by reservists even without the requirement for qualifying service. This is because the Reserve Forces legislation established a separate Reinstatement Committee (operated by the employment tribunals service) to hear claims that reinstatement has not been offered on reasonable terms.

Given that there are no fees to start such a case, that is likely to be the first port of call for any reservist who is not taken back on following a period of mobilisation.

Fathers and ante-natal appointments

1 October also marks the introduction of brand new antenatal rights for fathers and partners to take time off work to accompany a pregnant woman to see a midwife or obstetrician. The new right applies from 'day one' of employment. Agency workers will also qualify after they have been 12 weeks in a placement with the same employer.

The new right is limited to attendance at two antenatal appointments. The total time off during working hours for each appointment should be no more than six and a half hours. There is no express right for time to be paid, so any payment will be at your discretion. Requests can be refused if reasonable to do so.

What should I do?

You should be reviewing any family friendly policies to reflect these new rights, and also thinking about procedures for handling requests to attend antenatal appointments.

Managers may also need training on how to handle such requests. Please do contact us if you would like any assistance with this.

Asim Khan
Solicitor

Case law watch

With Asim Khan
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Court will not re-write an ineffective restriction

Ambiguous contractual restrictions will usually be interpreted against the party who drafted them. The wording of a restriction should enable employees to know with certainty exactly what they can and cannot do. Courts have shown a reluctance to rewrite covenants under the "blue pencil test". The recent case of *Prophet plc v Huggett* demonstrates this.

Mr Huggett left his employer, a software company, to work for a competitor. His contract contained a non-compete covenant, but due to an error in the drafting the wording of the covenant made no sense. Taken literally, the covenant said that Mr Huggett could not sell the Prophet software after he left Prophet, meaning the covenant was useless as only Prophet sold that specific software.

The High Court (whose decision we reported in our May edition) departed from its normal rule and 're-wrote' the clause to make it work. On appeal, the Court of Appeal has now re-stated the traditional approach by holding that a poorly drafted restrictive covenant should not be rewritten to make it commercially effective and enforceable.

What went wrong was that the company had not thought through the practical benefit that the restriction was likely to bring upon Mr Huggett's departure.

The current position is that if a clause is clear, but meaningless or absurd, employers cannot rely on the court to rectify their mistake.

What should I do?

Ensure that restrictive covenants are carefully drafted and specific to the circumstances of the employees. In particular carefully consider what you are seeking to protect and the risk posed should a specific employee leave.

The wording of any restriction should go no further than is reasonably necessary to protect the company's interests.

Case law watch

Communication by external HR consultant had contractual effect

"This case indicates that if an employer holds out an individual as having authority to communicate a decision for the employer, that individual's communication has the potential to bind the employer."

In the case of *Hershaw and ors v Sheffield City Council,* an HR consultant was authorised to communicate the result of a grievance to the employees and accordingly sent a letter setting out an appeal body's decision in relation to the employees' pay grade.

The council realised that a mistake had been made in the consultant's letter and reconvened the appeal panel to clarify its decision. A claim for unlawful deductions from wages was brought by the employees.

It was held by the Employment Appeals Tribunal (EAT) that the consultant's letter to the employees was capable of having contractual effect and the council was bound by the decision communicated by the consultant.

This case indicates that if an employer holds out an individual as having authority to communicate a decision for the employer, that individual's communication has the potential to bind the employer.

What should I do?

Check communications sent to employees to ensure the contents are accurate and reflect your decisions, in order to minimise the risk of being bound by unintended contractual terms.

Remind third parties acting on your behalf that any oral or written communication which an employee relies upon on for their employment, should only be made with your express written consent.

Balancing employee's conduct with employer's breach of process

In constructive dismissal cases the focus is usually on the conduct of the employer. If there are issues raised about the employee's conduct, the recent case of *Firth Accountants Ltd v Law* demonstrates that tribunals should consider whether any reduction to an award would be just and equitable, even if they decide not to reduce it.

The employer started to have doubts about the employee's ability to carry out her duties, and raised concerns with her son, instead of her. When the employee found out, she resigned and claimed constructive dismissal due to a breach of the implied term of mutual trust and confidence.

Whilst the claim was successful, the employer argued that the compensation should have been reduced to reflect her contributory conduct, because the employee had failed to accept criticisms about her performance.

The EAT held that whilst the tribunal could, in theory, make a finding that the employee contributed to her dismissal, this was not the case on this occasion.

What should I do?

You should be aware that an employee's conduct does not mean that you can disregard your obligations both implied and contractual to the employee. If you have concerns about an employee's performance or conduct, ensure that the correct procedure is followed in line with the company's policies.

Who breached first?

"The EAT held that if one party commits a repudiatory breach but the other party does not accept the breach, the contract continues."

To establish a constructive dismissal, there needs to be a repudiatory breach of contract by an employer, which is accepted by the employee and thus ends the contract.

A key question is whether an employee's prior breach prevents them from relying on their employer's subsequent breach. This was addressed in the recent case of *Atkinson v Community Gateway Association.*

The case concerned the resignation of an employee pending a disciplinary investigation into budgetary overspends and the misuse of the email system.

The employee claimed constructive dismissal based upon a repudiatory breach by the employer in, amongst other things, searching his emails.

The EAT held that if one party commits a repudiatory breach but the other party does not accept the breach, the contract continues.

In this case, the employer had not accepted the employee's previous breach, primarily because it was (quite properly) going through a disciplinary process.

However, where the party originally at fault was an employee who subsequently brought a successful constructive dismissal claim, the tribunal would inevitably be required to consider reducing the compensation.

If the employee would have been fairly dismissed anyway, the reduction could be up to 100%.

What should I do?

Even if you think an employee has committed a repudiatory breach of contract, in most cases you will need to go through a disciplinary procedure before 'accepting the breach' by dismissing the employee. Otherwise you might face an unfair dismissal claim. If you choose not to act, you may have 'waived the breach' and might not be able to rely on it later.

Conversely, if an employee purports to ignore their employment contract by resigning without giving proper notice, you do not necessarily have to accept the resignation and you can hold them to the contract. This can be a useful tactic if they want to join a competitor and you should always take legal advice in these circumstances.

Employment law 'to go' seminars

Dates & topics

Tues 18 November 2014 - fully booked
Employment law update
Venue: Holiday Inn Express South, Gloucester

***New date* Thurs 27 November 2014**
Employment law update
Venue: Holiday Inn Express South, Gloucester

Take away some top tips from our breakfast seminar series. As well as refreshing knowledge and staying up-to-speed with employment law requirements in an organisation, our seminars provide a networking opportunity to share ideas with other like-minded professionals.

To register to attend please visit www.willans.co.uk/events or call 01242 514000.

Help us plan 2015's topics. Please email suggestions to matthew.clayton@willans.co.uk

Contact

For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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